Eugene Planning Commission

AGENDA

Meeting Location:
Harris Hall
Lane County Public Service Building
125 East 8th Avenue
Eugene, Oregon 97401

Phone: 541-682-5481
www.eugene-or.gov/pc

The Eugene Planning Commission welcomes your interest in this agenda item. Feel free to come and go as you please at the meeting. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours' notice prior to the meeting. Spanish-language interpretation will also be provided with 48 hours' notice. To arrange for these services, contact the Planning Department at 541-682-5675.

TUESDAY, AUGUST 23, 2016 – 6:00 P.M.

PUBLIC HEARING: APPEAL OF HEARINGS OFFICIAL DECISION FOR CATHEDRAL PARK (CU 02-4)

The Planning Commission will hold a public hearing on appeal of the Hearings Official's decision to approve a conditional use permit for 172 units of Controlled Income and Rent housing on the southerly undeveloped 15.8 acres of the Rest Haven Memorial Park cemetery at 3900 Willamette Street. See agenda item summary for more information.

Lead City Staff: Gabe Flock, 541-682-5697
gabriel.flock@ci.eugene.or.us

Public Hearing Format

1. Staff introduction/presentation.
2. Public testimony from applicant and others in support of application.
3. Comments or questions from neutral parties.
4. Testimony from opponents.
5. Staff response to testimony.
6. Questions from Planning Commissioners to staff.
7. Rebuttal testimony from applicant.
8. Closing of public hearing.

Planning Commissioners: Steven Baker; John Barofsky (Vice Chair); John Jaworski; Jeffrey Mills; Brianna Nicolello; William Randall; Kristen Taylor (Chair)

AGENDA ITEM SUMMARY
August 23, 2016

To: Eugene Planning Commission

From: Gabe Flock, Senior Planner, Eugene Planning Division

Subject: Appeal of Hearings Official Decision: Cathedral Park (CU 02-4)

ACTION REQUESTED

The Planning Commission will hold a public hearing on an appeal of a Conditional Use Permit (CUP) application that was recently approved by the Eugene Hearings Official. The application and CUP approval is for a development proposal that includes up to 172 dwelling units of Controlled Income and Rent (CIR) Housing.

BACKGROUND

The proposed development is located on the undeveloped southerly portion of the Rest Haven Memorial Park cemetery property at 3900 Willamette Street, encompassing an area of approximately 15.8 acres. A vicinity map and a reduced version of the applicant's most recent site plans of record are provided as Attachments A and B.

The CUP application for Cathedral Park was originally submitted on April 8, 2002. The City initially deemed the application incomplete and upon submittal of supplemental application materials, the applicant requested that the City deem the application complete for processing. The City's Planning Director then responded with a letter to the applicant rejecting the application, with an explanation of the City's reasoning (i.e. the inability to address the conflicts that it posed between the proposed development and the existing CUP for Rest Haven Memorial Park").

The applicant appealed the City's decision to reject the application to the State's Land Use Board of Appeals (LUBA). LUBA remanded the City's decision to reject the application (see LUBA No. 2002-131, included in the full record), meaning they returned it to the City to undertake the required land use application process for a CIR-CUP application. Following the remand, the applicant did not request that the City proceed with its review and decision on the application until recently, on May 11, 2016.

Given the procedural history dating back to 2002 when the application was originally deemed complete, the City's review of the proposal is based exclusively on the applicable approval criteria that were in effect for CIR housing at the time the application was submitted (see EC 9.696-9.724). In other words, the decision to approve, approve with conditions or deny the proposal must be based only on whether the proposal complies with these criteria. EC 9.386(13), in effect at that time, provides that "[w]here an application is processed under section 9.724, the provisions of that section are exclusive" and thus no other approval criteria apply. The applicable approval criteria from EC 9.724, are listed in both the original staff report and the Hearings Official's decision approving the CUP.

The initial public hearing on this CIR-CUP request was held on June 29, 2016 and the record was left open for additional evidence and testimony until July 8, 2016. Another period was allowed for response to the open record testimony until July 15, 2016. Applicant's final written argument was due by July 22, 2016 and the Hearings Official's decision granting approval was issued on July 31, 2016. The Hearings Official's decision includes a number of approval conditions under the applicable criteria related to phasing, necessary infrastructure, preservation of trees and other vegetation, setbacks and screening. See Attachment C for a full copy of the Hearings Official's decision granting approval of the applicant's CIR-CUP request.

Please also refer to the original staff report for a more detailed summary of the procedural history of the application to date. The applicant's materials also include a detailed analysis on the legislative history of the City's CIR housing provisions which provide helpful context as to the narrow scope and exclusive nature of the applicable approval criteria for CIR housing in this case.

PLANNING COMMISSION'S REVIEW ROLE

Based on procedural requirements set forth in the Eugene Code (2002), the Planning Commission may address only those appeal issues set out in the written appeal statements. Further, the Planning Commission limits its consideration to the evidentiary record established before the Hearings Official (see EC 9.714). The Planning Commission generally does not accept new evidence on appeal, and the decision on appeal is based on whether or not the Hearings Official failed to properly evaluate the application or make a decision consistent with the applicable criteria. Those criteria are the exclusive CIR-CUP approval criteria, as noted above, from EC 9.724. Before granting an appeal, or changing the conditions of approval the Hearings Official imposed, the commission is required to make findings of fact as to why the Hearings Official's findings were in error (see EC 9.716).

SUMMARY OF APPEAL ISSUES

Two appeals of the Hearings Official's approval decision were received by the City on August 11, 2016. The first was submitted by Bill Kloos on behalf of the applicant, Charles Wiper, Inc. This appeal is focused solely on the "goal post rule" (ORS 227.178(30(a) and whether the standards in effect on April 8, 2002 would be used to evaluate and issue any permits needed to implement the approval of the CIR-CUP.

The second appeal was submitted by Marilyn Cohen on behalf of multiple co-appellants, and include five appeal issues, which are briefly summarized below:

1. Public wastewater services are not available to the entire project;
2. The 1995 CUP restricts the applicant's ability to develop the site and to access roads and utilities on other parts of the cemetery;
3. There is insufficient evidence in the record regarding the proposed private stormwater services and the proposed private street;
4. Proposed piping of Brae Burn Creek and the capture, piping and pumping of surface and stormwater to irrigate portions of the cemetery unnecessarily removes attractive and natural vegetation;
5. The application is too vague for approval.

Please see the attached written appeal statements for further information on the appeal issues raised (see Attachments D and E). The City Attorney's memo pertaining to the "goal post rule" that is referenced in the applicant's appeal is provided as Attachment F. Due to the short timeframe between receipt of the appeals and publication of this agenda item summary, it was not possible to provide an itemized response or recommendation on each appeal issue.

STAFF RECOMMENDATION

Staff recommends that the Planning Commission hold the public hearing and upon subsequent deliberations (scheduled for August 25th and 29th) determine whether to affirm, modify, or reverse the Hearings Official's decision. Staff also notes that the final local decision on this appeal is required by September 8, 2016 in order to meet the statutory 120-day deadline.

ATTACHMENTS

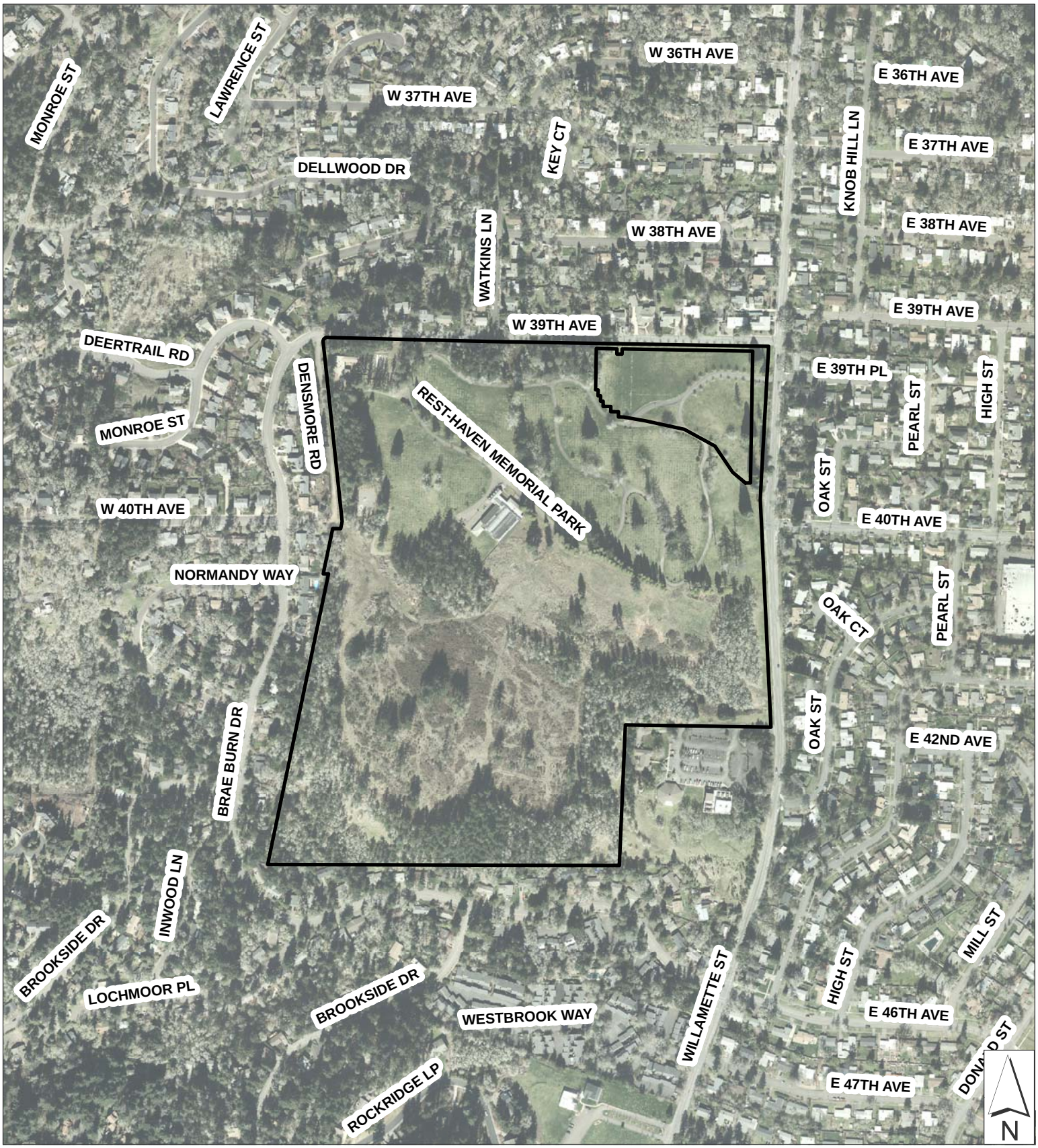
A. Vicinity Map
B. Reduced Site Plan
C. Hearings Official Decision
D. Applicant's Appeal Statement
E. Opponent's Appeal Statement
F. City Attorney's Memo (June 29, 2016)

The entire record of materials for the subject application is available for review at the Eugene Planning Division offices and will be provided to the Planning Commission separately. The full record will also be available at the public hearing, and is publicly available on the City's website at: http://pdd.eugene-or.gov/LandUse/SearchApplicationDocuments?file=CU-02-0004.

FOR MORE INFORMATION:

Please contact Gabe Flock, Senior Planner, Eugene Planning Division, by phone at (541) 682-5697, or by e-mail at gabriel.flock@ci.eugene.or.us.

Cathedral Park - Vicinity Map (CU 02-4)



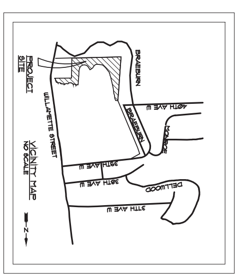
0 250 500 1000 Ft

Legend

Rest Haven Cemetery Property

Controlled income and rent housing proposed on southern portion of property (see site plan)

2008 AERIAL SHOWN



CU-1A

Project Number	
Drawn By	ces
Checked	ces
Date	16 August 2002
Phase	

Revisions

#	Date	Description
		June 29, 2016

Scale: 1" = 100'-0"

CATHEDRAL PARK AERIAL EXHIBIT

CONDITIONAL USE PERMIT

REGISTERED LANDSCAPE ARCHITECT
CAROLE SCHIRMER
#325
11-18-94
OREGON

SCHIRMER SATRE GROUP
375 West 4th, Suite 201, Eugene OR 97401
Phone: 541.686.4540 Fax: 541.686.4577
www.schirmersatre.com

DECISION OF THE HEARINGS OFFICIAL
FOR THE CITY OF EUGENE, OREGON

CONDITIONAL USE PERMIT REQUEST

Application File Name (Number):

Cathedral Park (CU 02-4).

Application Summary:

Conditional use permit application to construct 172 units of controlled income and rent housing.

Property Owner/ Applicant:

Charles Wiper.

Lead City Staff:

Gabe Flock, Senior Planner.

Subject Property/Zoning/Location:

Southerly portion of undeveloped portion of Rest Haven Memorial Park Cemetery, west of Willamette Street, north of Braeburn Drive. Assessor's Map 18-03-18-00 Tax Lot 300. The current zoning is R-1/WR – Low-Density Residential with a Water Resources Conservation Overlay. When the application was filed, the zoning was RA – Suburban Residential and did not include the Water Resources Conservation Overlay.

Relevant Dates:

The application was originally submitted on April 8, 2002. The application was eventually deemed incomplete on August 15, 2002 and rejected by the City on September 13, 2002. The Land Use Board of Appeals remanded the City's decision on March 3, 2003. The applicant requested that the remand application be processed on May 11, 2016. A public hearing was held on June 29, 2016.

Summary of the Public Hearing

At the public hearing, senior planner Gabe Flock discussed the staff report and explained that there was not enough information to demonstrate compliance with all of the approval criteria. City attorney Anne Davies discussed the applicable ordinances. The applicant's representatives explained the nature of the application and argued in favor of its approval. A number of neighbors and other opponents testified in opposition to the application. At the conclusion of the public

hearing, the record was left open nine days for the submission of new evidence, one additional week for responses to the new evidence, and one more additional week for the applicant's final legal argument.

DOCUMENTS CONSIDERED BY THE HEARINGS OFFICIAL

I have considered all of the documents in the planning file for the proposed conditional use permit (CU 02-4), including all the materials submitted during the open record period, as well as the testimony provided at the public hearing.

FACTS

This case involves an unusual situation. The subject property, Rest Haven Cemetery, has been involved in numerous land use applications, disputes, and appeals to various bodies. The cemetery is a 72-acre parcel surrounded by residential uses. The present case begins with a conditional use permit (CUP) approval obtained in 1995 that authorized the cemetery use in two phases. The first phase authorized cemetery uses on the most of the property except the southern portion of the property. The second phase authorized cemetery uses on the southernmost 15.8 acres of the property known as Zone 6 (the area in dispute in the present case) subject to Condition of Approval 17 which required a 75-foot buffer along the southern property line. The CUP did not approve a specific development plan for the second phase, but instead required a later application and approval in order to develop that portion of the property.

In 2002, the owner sought to develop Zone 6 as controlled income and rent (CIR) housing. The CIR application was filed as a CUP under the applicable Eugene Code (EC) provisions at the time. The City refused to process the 2002 CIR housing application because the City believed the CIR application was in conflict with the 1995 CUP. The owner appealed the City's refusal to process the application to the Land Use Board of Appeal (LUBA), who remanded the decision instructing the City to process the application and make a decision. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003). Subsequent to the remand, the owner filed a new application to allow the CIR housing or to modify the 1995 CUP to remove Zone 6 from the cemetery CUP. This application was not a proceeding on remand on the CIR housing application that had been remanded by LUBA. Instead it was a new application regarding the 1995 CUP. The City denied this application because allowing CIR housing in Zone 6 could not be accomplished with a CUP modification. The owner appealed that denial to LUBA, and LUBA affirmed the City's denial. *Wiper v. City of Eugene*, 47

Or LUBA 21 (2004). Thus, the existing state of circumstances was an approved 1995 CUP and a remanded 2002 CIR housing application.

The remanded CIR housing application sat unaddressed for many years. A recent change in state law requires such lingering applications to be processed or abandoned. The applicant therefore asked that the 2002 CIR housing application be processed. The applicant realizes that CIR housing cannot be approved on Zone 6 unless Zone 6 is removed from the 1995 cemetery CUP. In order to remove Zone 6 from the 1995 CUP, the applicant must obtain approval of a new CUP for the cemetery, and the applicant has apparently begun the process of seeking a new CUP. Normally, the applicant would obtain the new CUP for the cemetery that would remove Zone 6 before applying for the CIR housing, but because the new statute requires action on the remanded CIR application within a certain time the CIR CUP must proceed before obtaining a new CUP for the cemetery. The applicant realizes that approval of the CIR CUP would require a condition of approval requiring approval of a new CUP for the cemetery removing Zone 6 from the 1995 CUP.

The proposed CIR CUP application request is for approval of 172 units consisting of 12 studio units, 36 one-bedroom flats, 92 two-bedroom flats, 20 two-bedroom townhouses, 12 three-bedroom townhouses, and one community building. The applicant does not intend to develop the CIR housing but rather to work with an experienced developer of affordable housing to complete the project. Because the applicant is not planning on developing the project independently, some of the details of the proposed development are not as specific as if the application were being submitted by the developer. The proposed development would construct Cathedral Way running in a roughly U-shape from Willamette Street on the east, along the southern portion of Zone 6, and connecting to West 40th Avenue on the west, which would then connect to Braeburn Drive further to the west. The residences would be constructed along Cathedral Way. Although some of the existing trees would remain, many of the trees in the 75-foot buffer would be removed. Cathedral Way would run along the southern boundary of the property but would still have some buffer. When Cathedral Way turns north and runs along the western boundary, however, the developed area would be adjacent to the property line. A creek crosses the property in the southwest portion of the property. The creek is piped on both sides of the property but is not piped on the property. The application seeks to pipe the rest of the creek, and to use collected surface water and storm water for irrigation purposes.

ANALYSIS

This application was originally filed in 2002. Under the "goal post" rule, the application must be decided based upon the approval criteria that were applicable when the application was first submitted.[1] In 2002, CIR housing was a conditional use in the RA zone. EC 9.724 (2002) provided the applicable provisions for CIR housing.[2] EC 9.724(1) provides:

> "Allowance of increased density. Subject to the standards contained in this section, the hearings official may increase density as follows:
>
> "(a) In RA and R-1 zoning districts, up to 75 percent of the allowable density for an R-2 development * * *."

As the staff report explains, the allowable density for R-2 development was 20 units per acre, so the proposed CIR CUP may have up to 15 units per acre. The staff report further explains that the proposed CIR CUP would have a density of either 11 or 11.8 units per acre depending on whether the Cathedral Way is included in the calculation. Either way, the proposed density easily is less than the allowable 15 units per acre. EC 9.724(1) is satisfied.

EC 9.724(2) provides:

> "Criteria for hearings official approval. Applications for conditional use permits for controlled income and rent housing shall be processed and scheduled for public hearings in the same manner as other conditional permit applications, except the following shall substitute for the required criteria listed in 9.702:
>
> "(a) Public facilities and services are available to the site. If the public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to the need by reason of:
>
> "1. Prior commitment of public funds or planning by the appropriate agencies, or
>
> "2. A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or

[1] ORS 227.178(3)(a) provides: "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[2] Unless otherwise noted, all EC references are to the 2002 version that was applicable when the applicable was filed.

> "3. Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development."

The staff report states that public facilities are available to the site. Opponents provided substantial amounts of testimony arguing that various public facilities and services are inadequate to serve the increase in population that would occur with approval of the CIR housing. In particular, opponents argue sanitary sewer, storm water, schools, and roads are not adequate to serve the proposed development. Opponents argue that traffic is already congested and dangerous on both sides of the property. According to opponents, the proposed CIR housing would only exacerbate an already serious problem. Opponents also argue that storm water runoff already causes problems for properties near the southwestern corner of the property. According to opponents, the creek in the southwestern corner already floods and the increased impervious surfaces would make the problem worse. Opponents also argue that schools do not have capacity for the additional students that would arrive with the proposed development.

If EC 9.724(2)(a) required that all public facilities and services were adequate to serve the proposed use, I might well agree with opponents that the approval criterion was not satisfied. EC 9.724(2)(a), however, does not require that public facilities and services are adequate – merely that they are "available." As the applicant explains in a lengthy history of the CIR ordinances, an earlier version of EC 9.724(2)(a) required that "[p]ublic and private facilities are *adequate* to meet anticipated demand." (Emphasis added.) After the adequacy requirement resulted in problems for obtaining approvals for CIR housing, the City amended the EC to remove the adequacy requirement so that CIR housing applications could be approved as long as public facilities and services were available to the site rather than requiring that they be adequate. As the applicant further explains, the Planning Commission applied the version of EC 9.724(2)(a) at issue in the present case in the Woodleaf Village case (CU 95-7) and in response to arguments that public facilities and services were not adequate found that the EC amendments removed the adequacy requirement. The Planning Commission found that public facilities and services were available to the property and imposed conditions of approval to improve some of the public facilities and services that needed improvement due to the project. As the Woodleaf Village case makes clear, the question under EC 9.724(2)(a) is whether public services are available not whether they are adequate. In the present case, even though some of the public facilities and services may be

currently inadequate they are available.[3] Opponents' arguments concerning the inadequacy of public facilities and services do not provide a basis for denying the application.

Many of the opponents' arguments regarding traffic, noise, disturbances, views, and storm water are based on the alleged adverse impacts the proposed CIR housing development would have on the opponents' use and enjoyment of their properties. While those would be valid and relevant arguments under a standard CUP application, such adverse impacts are not a consideration under EC 9.724(2), except as discussed later under EC 9.724(2).[4] Therefore, except as discussed later, opponents' arguments regarding adverse off-site impacts do not provide a basis for denying the application. EC 9.724(2)(a) is satisfied.

EC 9.724(2)(b) provides:

> "The proposed project is designed to:
>
> "1. Avoid unnecessary removal of attractive vegetation;
>
> "2. Provide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas; and
>
> "3. Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress."

EC 9.724(2)(b)(1) requires that the proposed project is designed to "[a]void unnecessary removal of attractive vegetation." The CIR housing application proposes to remove substantial amounts of vegetation. All of the vegetation contained within the U-shaped site plan is proposed to be removed to construct the proposed road, buildings, and facilities. Opponents argue that the proposal violates EC 9.724(2)(b)(1) because so much vegetation is proposed to be removed. According to opponents, too much vegetation would be removed, in particular the large trees that currently provide a buffer on the southern portion of the property. The staff report states that there

[3] The applicant and staff have proposed conditions of approval to improve public facilities and services.

[4] Under current EC 9.8090(2) the conditional use approval criteria provide: "The location, size, design, and operating characteristics of the proposal are reasonably compatible with and have minimal impact on the livability or appropriate development of surrounding property, as they relate to the following factors: (a) The proposed building(s) mass and scale are physically suitable for the type of density of use being proposed. (b) The proposed structures, parking lots, outdoor use areas or other site improvements which could cause substantial off-site impacts such as noise, glare and odors are oriented away from nearby residential uses and/or are adequately mitigated through other design techniques, such as screening and increased setbacks. (c) If the proposal involves a residential use, the project is designed, sited and/or adequately buffered to minimize off-site impacts which could adversely affect the future residents of the subject property."

is not enough information to determine whether there is unnecessary removal of attractive vegetation:

> "Because the full extent of vegetation removal remains unclear, and the applicant has not justified the necessity of the proposed alignments, the necessity for vegetation removal in those areas is not clearly demonstrated. Without more precise information regarding the location of existing vegetation, and the area of necessary construction impact to accommodate the proposed facilities (serving the proposed CIR housing), an evaluation of the extent of necessary vegetation removal is not possible at this time.
>
> "Staff acknowledges that something less than a full tree inventory (as required for Woodleaf Village) would be adequate, subject to consideration and approval by the Hearings Official. For example, the applicant could still provide a more detailed plan showing the full extent of grading and site improvements, a more detailed look at the trees adjacent to the limits of proposed impact, along with an arborist report recommending proposed protection measures.
>
> "Additionally, conditions of approval could be imposed to ensure that a tree preservation plan is put in place to ensure protection of the trees indicated to remain over the long-term, and pending any additional evidence provided by the applicant, staff would request the opportunity to evaluate and recommend any appropriate conditions of approval in response to what is provided." Staff Report 11.

The applicant provided clarification for which portions of the property would have vegetation removed. While the exact specifications of the proposed development are not finalized, the applicant has provided a site plan that shows which areas would have vegetation removed. The applicant again explains how the Planning Commission interpreted this provision in the Woodleaf Village case. The Planning Commission found:

> "Given the intent and direction of the council to facilitate the construction of controlled income rent housing, and the fact that this term is found in the criteria for approval of an increase in density, leads to a conclusion that an element of necessary destruction of vegetation is that which must be lost to accommodate the increased density. The maximum allowable density under the ordinance must be presumed and vegetation lost to accommodate that maximum density is necessarily lost. * * *
>
> "It is a fact of development, however, that the site must accommodate the housing units, common areas and dedicated streets. If a site has vegetation throughout, as this one does, it will be necessary to remove a substantial portion of that vegetation in order to accommodate a controlled income and rent housing project."

As the applicant demonstrates, under EC 9.724(2)(b)(1) if CIR housing construction is proposed for a particular area then the vegetation gets removed. In areas that are not proposed for development, the vegetation is to be preserved. The CIR housing proposal only proposes to remove vegetation in the areas proposed for development. The application proposes to retain the remaining vegetation. The applicant has suggested conditions of approval that further protect remaining vegetation. While it is true that a large amount of vegetation is proposed to be removed, under the reasoning in Woodleaf Village it is not unnecessary removal. Furthermore, the applicant is not even proposing to develop to the maximum allowable density.

As discussed earlier, the applicant proposes to pipe the currently exposed creek in the southwestern portion of the property. Opponents argue, among other things, that in order to pipe the creek that additional vegetation would have to be removed. According to opponents, because the applicant does not have to pipe the creek (and they also argue piping the creek is prohibited) removing vegetation to pipe the creek is unnecessary. The applicant explains that piping the creek is necessary to get sanitary lines under the creek to reach City facilities south of the property and that it is necessary to remove vegetation to get storm water to the creek. Opponents have not pointed to anything in the 2002 EC that would prohibit piping the creek. I agree with the applicant that piping the creek is part of the CIR housing development and therefore removing vegetation for that development is not unnecessary. EC 9.724(2)(b)(1) is satisfied.

EC 9.724(2)(b)(2) requires that the proposed project is designed to "[p]rovide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas." Currently there is at least a 75-foot buffer in Zone 6 for residences to the south and southwest of the property. The proposed CIR housing would eliminate much but not all of the buffer on the southern boundary and would eliminate all of the buffer on the western boundary where Cathedral Way would connect to West 40th Avenue. Opponents argue that eliminating so much of the 75-foot buffer would not provide enough of a setback along the southern and western boundaries. According to opponents, adjoining residences need to be screened from the proposed use to protect their privacy. The staff report found that it was not clear that EC 9.724(2)(b)(2) is satisfied.

> "Based on the applicant's June 9, 2016 site plans, trees and vegetation generally provide adequate screening along the southern and southwestern property lines, assuming preservation of such areas is conditioned. However, along the western property line (just south of the proposed connection of the private street to W.

> 40th Avenue) high-impact/activity areas including parking areas and trash enclosures are shown located right on or adjacent to the property line. No trees or vegetation is proposed to be retained or preserved in these areas, nor is any screening shown on the site plans. As apparent on the aerial photo, this area backs up to outdoor living areas of the adjacent residential uses. While staff believes that residential development is not necessarily or inherently incompatible with other adjacent, residential uses, the applicant's plans with regard to setbacks, fencing and screening are not entirely clear under this standards in terms of ensuring privacy to adjacent outdoor areas. It may be that with additional information, clarification, and perhaps refinements to the proposed site plans that the applicant could demonstrate compliance under this standard." Staff Report 12.

Although the exact details of the CIR housing would not be provided until a CIR developer is brought in, the proposed site plan shows the areas where the housing, roads, parking lots, and public facilities would be located. Even though the precise details of development are not known, the proposed site plan shows where the development would be located in relation to adjoining residences. EC 9.724(2)(b)(2) concerns ensuring "privacy to adjacent outdoor living areas." The adjacent outdoor living areas at issue are the back yards of residences adjoining the subject property to the south and west. I agree with the staff report that the proposed CIR housing has sufficient setbacks and screening from the residences to the south and southwest. In the south and southwest portions of the proposed site plan the proposed CIR housing is not developed up to the property line. There are open spaces and existing trees that would be retained that provide adequate screening to adjoining backyards.

The back yards to the west present a closer question. The proposed site plan shows the CIR development. There are residences, parking areas, and trash receptacles very close to the west property line on the site plan. If the approval criterion required that there be adequate setbacks and screening to ensure the privacy of adjacent outdoor uses, I would likely agree with opponents that the application does not satisfy the approval criterion. EC 9.724(2)(b)(2), however, only requires that the privacy of adjacent outdoor living area be ensured when "possible and practical." The applicant explains that the Planning Commission determined what EC 9.724(2)(b)(2) means in the Woodleaf Village case.

> "[EC 9.724(2)(b)(2) does] not promise much in the way of absolute protection from impacts of an abutting development of a controlled income and rent housing project. In short, the criterion requires the developer to 'do the best you can under the circumstances.' No absolute level of effectiveness of setback or

> screening reducing impacts on adjacent property is required or assumed by the criterion."

Although the proposed CIR housing development is adjacent to the residences adjoining the property to the west, the applicant has done the best it can under the circumstances. Given that Cathedral Way connects to West 40th Avenue, the proposed development needs to be closer to those residences. Proposed conditions of approval require a sight obscuring fence, wall, or vegetation along the western property line to provide screening. While total privacy of adjacent outdoor living areas would not be achieved, the application ensures such privacy as much as is possible or practical under the circumstances. EC 9.724(2)(b)(2) is satisfied.

EC 9.724(2)(B)(3) requires that the proposed project is designed to "[p]rovide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress." Opponents argue that the application does not meet this approval criterion, in particular ingress and egress from the property. The staff report explains how the application satisfies the safety requirements for these features. The staff report focuses on the safety of such features on the subject property and ingress and egress from the property. Opponents' arguments include concerns about dangerous conditions on the roads adjoining the property. I agree with the staff report that the application satisfies the safety requirements on the subject property. The staff report notes that Cathedral Way may be too steep in certain places, but that such problems can be resolved through conditions of approval. Proposed conditions of approval require road design to comply with the 1999 road standards that were in effect at the time the application was submitted. With conditions of approval, EC 9.724(2)(b)(3) is satisfied.

EC 9.724(2)(c) provides:

> "The increase in density shall not be permitted in areas that are unavailable for controlled income and rent (CIR) housing with increased density. Areas that are unavailable for increased density are shown on Figure 33 as shaded areas. Those areas not shaded on Figure 33 are available for CIR housing with increased density."

As the staff report explains, the subject property is not within any of the shaded areas in Figure 33. Therefore, 9.724(2)(c) is satisfied. The applicant has satisfied all the applicable approval criteria for a conditional use permit.

A number of opponents' arguments misconstrue the nature of the application. Many of opponents' arguments are based on the theory that the proposed application violates the provisions

and conditions of approval of the 1995 CUP, in particular Condition of Approval 17. Even many of opponents' arguments regarding EC 9.724(2) incorporate references to a required 75-foot buffer. While Condition of Approval 17 from the 1995 CUP included a 75-foot buffer, there is nothing in the approval criteria for a CIR housing CUP that requires a 75-foot buffer. While opponents are correct that the proposed CIR housing would run afoul of the 1995 CUP and Condition of Approval 17, the application is specifically based on the premise (and a condition of approval) that the applicant will also obtain a new CUP regarding the cemetery use that allows Zone 6 to be removed from the cemetery CUP. All of opponents' arguments regarding the 1995 CUP and/or the 75-foot buffer area do not provide a basis to deny the application.

Although this decision approves a conditional use permit for CIR housing, the applicant cannot construct the CIR housing without obtaining further approvals, such as building permits. Since this application was filed in 2002, the City has adopted a number of new ordinances that arguably could apply to future permits for the CIR housing. The applicant explains that some of those provisions cannot be satisfied and would result in the approved CUP being prevented from being constructed. The applicant argues that none of the new provisions should be applicable to future permits necessary to develop the CIR housing under the goal post rule. *See* n 1. The City argues that the goal post rule would not be applicable to future applications to develop the property such as building permits and that the new provisions would apply. The applicant seeks conditions of approval determining that the new provisions do not apply to any future development of the CIR housing. The City seeks conditions of approval determining that the any future development of the CIR housing be subject to the current provisions.

While I understand the applicant's desire to decide the issue (the uncertainty regarding having to comply with provisions that are impossible to comply with could drive away potential developers), I think any decision on this issue would be speculative and advisory. The applicant and the City identify a number of potential EC provisions that they think could apply to any future building permits, but even if such provisions are likely to arise they have not yet arisen and there is no guarantee exactly which provisions may be at issue. The present application is for a conditional use permit to construct controlled income and rent housing, this application is not for building permits. Any speculation about what standards and criteria would apply to future building permits would be just that – speculation.

The parties spend a great deal of time discussing goal post rule cases and their applicability to the present situation. A number of those cases are not particularly relevant to the present situation because they did not involve a two-step approval process like the present case where the first step is approval of a certain type of use and the second step is an application for development such as a building permit to actually construct the use that was approved. Even in those cases involving a two-step process, the issue of what standards and criteria applied arose during the second step – when for instance building permits were submitted – not during the first step. The current application is just the first step, and I do not think it is appropriate or even possible to decide issues that might arise during the second step. For instance, the goal post rule only applies to applications for a permit. "Permit" is defined as "the discretionary approval of a proposed development of land." While it seems likely that any issues regarding what standards and criteria apply during a potential step two process would be discretionary, until such applications are filed and responded to by the City that is not absolutely for certain. Even assuming all such applications would be discretionary and permits for purposes of the goal post rule, there is hardly an exhaustive list of what potential EC provisions might apply, and as the goal post cases demonstrate the nature of those provisions might affect which standards and criteria apply. Even if the City is correct that current standards and criteria would apply, the City acknowledges that under *Gagnier v. City of* Gladstone, 38 Or LUBA 858 (2000), the City "may not apply development standards at the building permit phase, where to do so would result in denial of a project that was previously approved in the processing of a land use application." This further illustrates that the applicability or inapplicability of current standards and criteria will have to be addressed individually if and when they arise.[5] Until any future applications are submitted, any decision about what standards and criteria apply to those applications would be pure speculation.

DECISION

For all the reasons set forth above, the Hearings Official **APPROVES** the conditional use permit to construct 172 units of controlled income rent housing, subject to the following conditions of approval:

[5] This illustrates the difficulty of even trying to craft conditions of approval at this stage that would be workable at a later stage. A potential condition of approval would have to state which set of standards and criteria apply – except in circumstances where they do not apply. I do not think there is any way to definitively state now what standards and criteria might apply to any future applications. Those standards and criteria will have to be determined on a standard and criterion by standard and criterion basis.

CONDITIONS OF APPROVAL

1. As allowed by EC 9.718, the CIR CUP shall terminate unless an application for a development permit needed to implement the CIR CUP is applied for within 7 years of the effective date of approval. Thereafter, an application for a development permit needed to implement the CIR CUP for each subsequent phase must be applied for not later than 7 years after the completion of construction of the preceding phase. The CIR CUP will terminate with respect to any phase for which an application for a development permit is not applied for within the foregoing time limitations. For purposes of this condition, the "effective date of approval" is the date of all appeals, challenges, and/or suits related to the approval or denial of this CIR CUP and to the cemetery CUP required under these conditions of approval.
2. The property may be developed with up to 172 units of controlled income and rent housing with associated parking and other development described or depicted in the application and materials submitted in support thereof (CIR CUP). Development may occur in one or more phases. Except for the limitation of not more than 172 total units and the development impact area described in these conditions of approval, the site plan is conceptual in nature, is not binding, and the actual development may differ. The timing, size, mix of units, the number, location, and development to be included in each phase and all other matters pertaining to development of the approved CIR CUP are to be determined by the applicant. The applicant is not is not required to develop all of the approved CIR CUP. Property not developed with development approved under this CIR CUP may be developed for other uses provided that the applicant first modifies the footprint of the CIR CUP to remove such property.
3. The CIR CUP property will be developed solely with CIR housing as defined in the 2002 Eugene Code at EC 9.015. If the applicant seeks to develop non-CIR housing on the property, or to change the use in such a manner that it no longer complies with the definition of CIR housing in EC 9.015, the applicant shall obtain any necessary land use approvals and/or permits.
4. Before a development permit to construct any of the 172 units may be issued, a new cemetery CUP shall be obtained so that the area of the property developed with CIR housing lies outside the footprint of the cemetery CUP. The CIR CUP may share facilities

and/or services (including sanitary lines, storm water lines, water lines, electric lines, roads or other means of circulation) with the cemetery and other current or future uses which may be located on or off the property including those lying within the footprint of the new cemetery CUP and/or the CIR CUP.

5. The applicant may capture, pipe, and pump any surface water and/or storm water flowing on the property to a holding reservoir to be used for irrigation so long as the applicant obtains all required City, state, and/or federal permits as may be necessary.
6. Cathedral Way shall at a minimum meet private street construction standards for paving width and depth, sight distance, maximum grade, and sidewalks.[6]
7. Final plans for any phase shall demonstrate that any proposed street meets the local street standard as described in the Eugene Arterial & Collector Street Plan dated November 1999, including but not limited to, maximum grade requirements, sidewalk requirements, sight distance requirements, and traffic controls that might be needed at the proposed intersections.
8. Final plans for any phase for the number of parking spots shall meet the 2002 EC standards.
9. Available but inadequate public services and facilities to the site shall be improved to a level sufficient to support the particular phase of the CIR CUP development. Any such improvements shall be at the applicant's or developer's responsibility and expense.
10. The unimproved portion of West 40th Avenue that extends from the subject property to the intersection of Braeburn Drive shall be improved to the extent necessary to allow access to the CIR development. Options for improvement include a Privately Engineered Public Improvement (PEPI) or Temporary Surfacing Permit (TSP).
11. Concurrently with the proposed street improvements at the intersection of Cathedral Way and Willamette Street, the applicant or developer shall construct a public sidewalk, meeting applicable standards, along the frontage of the property from the intersection of Willamette Street and Cathedral Way running to or directly across from the nearest transit stop on Willamette Street.

[6] The applicant sought language allowing Cathedral Way to be constructed as a private street, public road, service drive, drive aisle, or combination of those options. I agree with staff that the application is for a private street so any approval should be for a private street as well.

12. Except as provided herein, development approved under the CIR CUP shall be located within the shaded area shown on CU-1A dated June 29, 2016 labeled "development impact area." Facilities and services (including sanitary lines, storm water lines, water lines, electric lines, roads, or other means of circulation) may be located outside of the development impact area as determined by the Eugene Public Works Department. Final location of sanitary lines, storm water lines, and water and electric lines shall be as finally determined by the City in PEPI plans and by EWEB's engineering staff. The boundary of the development impact area may be modified by applicant as development occurs provided that such modification results in not more than a net increase of 10% per phase in the footprint of the development impact area to allow for project flexibility and/or to address public works, engineering, developer or funding agency requirements or unforeseen contingencies.
13. For each phase, the applicant shall provide a mapped inventory of existing trees along the boundary of that portion of the proposed development impact area (as depicted on the applicant's site plans dated June 29, 2016) to be developed during the particular phase. The inventory shall indicate the location, size, and species of existing trees within 20 feet of the development impact area boundary. Scaled dimensions shall also be provided on the mapped inventory, and the location of the boundary shall be clearly marked with flagging, stakes, or other obvious visible means of demarcation, in order to determine its actual location on the ground.
14. The entire development impact area may be graded and cleared of vegetation. Vegetation within the "CIR undeveloped area" shall not be removed unless it: i) is dead, diseased, hazardous, noxious or invasive species, or presents a fire threat as further addressed in these conditions of approval, or ii) is necessary to locate facilities or services as directed by Eugene Public Works or the Fire Marshall as addressed in these conditions of approval. If any tree located in the current Zone 6 and within 15 feet of the perimeter of the development impact area should die within 5 years of adjacent construction, that tree will be replaced at a 2:1 ratio with a tree from the City's approved tree planting list in the vicinity of the impacted tree.
15. The applicant shall obtain the services of a certified arborist to provide a report on the proposed impacts to existing trees included in the inventory, including a critical root zone

analysis for the trees along the boundary of impact. The arborist shall include proposed protection measures for trees within the 20-foot area along the boundary of the development impact area. The arborist shall also implement any protection measures needed to ensure the survival of trees on adjacent property where the development impact area abuts the property line along the western boundary of the subject site.

16. The applicant's final site plans for each phase shall be revised to show that the areas outside of the development impact area but presently within Zone 6 (as shown on the final approved plans for the cemetery CUP (CU 95-2)) are designated as "CIR undeveloped area" that are subject to the following additional requirements;
    a. Trees and other native vegetation within the designated "CIR undeveloped area" shall be retained and protected to the extent possible with protective fencing installed at the direction of the certified arborist along the boundary of the impact area, and subject to inspection and approval by City staff, prior to and for the duration of any adjacent construction-related activity.
    b. No excavation, grading, material storage, staging, vehicle parking, or other construction activity shall take place within the identified "CIR undeveloped area" without prior approval by the City.
    c. Removal of dead, diseased, or hazardous tress shall be allowed with documentation from a certified arborist as to the condition of the tree and the need for removal. Documentation must be provided to the City for review and approval prior to tree removal activity. Otherwise, vegetation within the "CIR undeveloped area" shall not be removed unless it is dead, diseased, hazardous, noxious, invasive, or presents a fire threat that is documented by the City's Fire Marshall.
    d. Any tree removed under the provision above shall be replaced at a ratio of 2:1. These replacement trees shall be native species, with a minimum caliper of 2 inches for deciduous trees and a minimum height of 5 feet for coniferous or evergreen trees. Planting, watering, and general maintenance of replacement trees shall be conducted by the property owner in a manner that ensures their establishment and long-term survival.
17. All structures, buildings, parking areas, and trash enclosures shall be setback from exterior property lines in accordance with applicable setback requirements.

18. The applicant's final plans shall show a minimum 6 foot tall site obscuring fence or wall that will be constructed of entirely sight-obscuring materials (i.e. solid, no openings) and/or vegetative screening at the direction of the applicant's landscape architect that will achieve a minimum height of 10 feet within 5 years of planting and be a minimum of 50% sight obscuring along the length of the western boundary where the development impact area abuts the property line as shown on CU-1A dated June 29, 2016. No other screening is required.
19. The required sight-obscuring fence, wall, or vegetative screen shall be installed and inspected for compliance by City staff, prior to occupancy of any dwellings or use of the proposed parking areas along this western boundary. Planting, watering, and general maintenance of the vegetative screen shall be conducted by the property owner in a manner that ensures establishment and long-term survival.

Fred Wilson

Hearings Official

Dated this 31st day of July 2016.

Mailed this _____ day of August 2016.

SEE NOTICE OF HEARINGS OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS

LAW OFFICE OF BILL KLOOS PC

OREGON LAND USE LAW
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EUGENE, OR 97401
TEL: 541.343.8596
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BILL KLOOS
BILLKLOOS@LANDUSEOREGON.COM

August 11, 2016

Robin Hostick, Planning Director
Atrium Building
99 West 10th Ave.
Eugene, OR 97401

Re: Appeal of Hearing Official decision; CU 02-4

My office is filing an appeal to the Planning Commission today on the matter above.

I am advising my client, Charles Wiper, Inc., that the appeal fee is 50% of the original application fee. The original application fee paid was $2,380, as evidenced by the attached receipt dated April 8, 2002. Hence, the appeal fee should be $1,190.00.

I hope this will avoid any confusion at intake.

Sincerely,

Bill Kloos

Bill Kloos

Cc: Client

Receipt

Planning & Development
Permit and Information Center
99 West 10th Avenue
Eugene, Oregon 97401
(541) 682-5086

Method of Payment:
- ☐ Cash
- ☒ Check
- ☐ Visa/MC

Received From CHARLES WIPER INC PO BOX 5509

Address

Phone ( ) CAROL SCHIRMER 686-4540

Amount Received $2380.00

Description/Reference Number:

Application Name CATHEDRAL PARK

Application Type CUP

Application #

Dale

LAND		PLAT	
☒	3300 Land Use Application	☐	3310 Plat (Final Plat)

Post-Monumentation Payments must be made at 858 Pearl Street.

Date 4/8/02

Staff Initials SKL

CITY OF EUGENE
PERMIT & INFORMATION CENTER
APR 0 8 2002
RECEIVED

OFFICE USE

PAID +2380.00
APR 08 2002
&T10
LAND USE APPLICATION - 2660
CHARLES WEBER
RECEIPT-# 03-0047310/CID

CITY OF EUGENE
BUILDING PERMIT SERVICES
[illegible] WEST 10TH AVE 682-[illegible]
REG-RECEIPT#03-0047310 [illegible] 2002
[illegible] 2:51 pm [illegible] 08 2002

[illegible] LAND USE APPLICATI [illegible]
TOTAL DUE [illegible]
RECEIVED FROM:
CHARLES ~~WEBER~~ WIPER
CHECK: [illegible]
TOTAL TENDERED $2,380.00
CHANGE DUE [illegible]

00000332

SUPPORTING NARRATIVE
CONTROLLED INCOME AND RENT
CONDITIONAL USE PERMIT APPLICATION
APRIL 7, 2002

A. Introduction

Charles Wiper, Inc. (CW, Inc.), an Oregon Corporation, is applying for a Controlled Income and Rent Conditional Use Permit pursuant to Section 9.724 of the Eugene Code. The proposed CIR use will be located on a portion of Tax Lot 300, Assessor's Map T18S, R3W, Section 18, in the south hills of Eugene. To the east of the use is Willamette Street, to the south and west is Brae Burn Drive, and to the north is Rest-Haven Memorial Park. This initial narrative is provided to demonstrate that the proposed use satisfies the criteria for a Controlled Income and Rent (CIR) conditional use permit.

The portion of Tax Lot 300 that is proposed for this use is that area which is not master planned for cemetery use. The majority of Tax Lot 300 was approved for cemetery use in 1995 in CU 95-2. That master plan approval was reduced to an Agreement with the City in a Conditional Use Agreement (Oct. 27, 1998). The southernmost acreage of the site owned by Charles Wiper, Inc. was not master planned for cemetery. It is zoned RA and is vacant. The total area that is not master planned for cemetery, and is therefore the subject of this application, is calculated to be 15.8 acres.

Background and General Description

The CIR use is being proposed by CW, Inc., the property owner, to create CIR housing for low-income families. CW, Inc. anticipates working cooperatively with an experienced developer of affordable housing, such as Metropolitan Affordable Housing Corporation (MAHC), an Oregon nonprofit corporation formed to develop low-income housing. Discussions with MAHC have begun. The applicant expects that the relationship with a developer will firm up during the city's review process.

The Eugene Code Section 9.015 defines controlled income and rent housing as:

> "A housing project, or that portion of a larger project, consisting of any dwelling type or types exclusively for low-income individuals and/or families, sponsored by a public agency, a non-profit housing sponsor, a developer, a combination of the foregoing, or other alternatives as provided for in the Oregon Revised Statutes or Federal Statutes to undertake, construct, or operate housing for households that are low income. For purposes of this definition, low-income means having income at or below 80 percent of the area median income."

The City of Eugene has a long and aggressive track record of supporting the development of low- and moderate-income housing for its residents, including under the CIR provisions of the

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August 11, 2016

Eugene Planning Commission
c/o Eugene Planning and Development
Atrium Building
99 West 10th Ave.
Eugene, OR 97401

Re: Cathedral Park (CU 02-4);
Applicant's Appeal of Hearings Official Approval with Conditions to Planning Commission

Dear Commissioners:

This appeal concerns an application for a conditional use permit to construct 172 units of controlled income and rent (CIR) housing on the southernmost 15.8 acres of Rest-Haven Memorial Park Cemetery, which is undeveloped and is located west of Willamette Street and north of Braeburn Drive.

This appeal is very narrow, but the lone appeal issue is enormously important:

> Does ORS 227.178(3)(a) (i.e. the "goal post rule") lock in the standards and criteria that were in effect at the time the CIR CUP application was submitted in 2002, or may the City apply subsequently adopted land use regulations such as the Multi-family standards (EC 9.5500), post-2002 storm water regulations (EC 9.6790-.6797), water resources conservation overlay (EC 9.4910), and traffic impact analysis (EC 9.8670)?

The Hearings Official approved the application with conditions. However, the Hearings Official declined to address a key issue raised by both the Applicant and the City. Since the Hearings Official declined to address the goal post rule issue he also omits a key proposed condition that the Applicant and developers of affordable housing in Eugene believe is essential in order to ***actually*** develop the subject property with affordable housing.

The Applicant respectfully requests that the Planning Commission make a finding specifically addressing the applicability of the goal post rule and add the following condition of approval to the Hearings Official's approval with conditions of CU 02-4:

> "ORS 227.178(3)(a) applies to this CIR CUP and all development thereunder. All permits issued to implement development approved under this CIR CUP shall be

> issued consistent with standards and criteria in effect on April 8, 2002 ("2002 EC Chapter 9"), if applicable, which standards are exclusive. Any land use regulations adopted since April 8, 2002 are not applicable to this CIR CUP. Such standards that do not apply, include, but are not limited to, the Multiple-Family Standards at EC 9.5500, Goal 5 (/WR overlay) standards at EC 9.4900, Traffic Analysis Review at EC 9.8659 and Stormwater Standards at EC 9.6790 in the current Eugene Code."

This appeal statement incorporates the Applicant's legal memoranda submitted to the Hearings Official concerning the meaning of and case law related to ORS 227.178(3)(a), the "goal post" rule, and its applicability to this land use application. (See attached).

I. Introduction

As the Hearings Official's decision accurately notes, "This case involves an unusual situation." Decision, p. 2. A brief summary of the relevant context surrounding this application is provided for the convenience of the Planning Commission.

On April 8, 2002, the Applicant submitted an application to develop CIR housing on the unplanned portions of Rest-Haven Cemetery. That CIR CUP application was deemed incomplete on August 15, 2002, and was then rejected by the City on September 13, 2002. That decision was appealed to LUBA, which remanded the City's decision on March 3, 2003.

That remanded application lay dormant at the City while the Applicant focused on developing the cemetery portion of the property. In addition, the Applicant was waiting for the appropriate time to develop the subject property for affordable housing when such a development would be successful However, newly passed state legislation compelled the Applicant to act on the CIR CUP sooner than anticipated. Oregon Laws 2015 Chapter 522, Section 3 (codified in ORS 227.181(2)(a)) requires an applicant to request the City to process an application that had previously been remanded to the City by LUBA within 180 days of the effective date of the final order or else the application is deemed "terminated." Motivated by this recent state legislation, the Applicant reactivated this CIR CUP application sooner than desired. The Applicant's alternative was to let the CIR CUP application become void. Letting the CIR CUP application terminate would be a significant loss to the Applicant and to the community at large.

One result of this unusual situation is that the Eugene Code as it existed in 2002 provides the approval criteria by which this application and related development is to be evaluated. ORS 227.178(3)(a), know as the "goal post" rule, provides:

> "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be

> based upon the standards and criteria that were applicable at the time the application was first submitted."

Consequently, the standards that apply to this application and development implementing the application differ significantly from the current Eugene Code land use regulations, which were extensively amended with the Land Use Code Update adopted soon after this application was submitted. An easy way for the Commissioners to recognize whether they are looking at a standard under the old code versus the present code is to look at the number of decimal places for the code section. If there are three decimals, it's the old code; if there are four decimals, it's the new code. For example, the definitions section of the 2002 Eugene Code is provided at EC 9.015. The definitions section of the present code is at EC 9.0500.

II. Summary of Issues

One issue is raised in this appeal. As noted above, the Applicant requests the Planning Commission to add an additional condition of approval that clearly states that the land use applications to develop the affordable housing on the property will be evaluated under the 2002 Eugene Code standards in effect at the time the CIR CUP application was submitted and will not be subject to the subsequently adopted standards and criteria of the current code. In short, the Hearings Official erred by not addressing the applicability of the fixed goal post rule in the decision, which was an issue raised during the proceeding and addressed exhaustively by the Applicant and the City. It should be understood that both the Applicant and the City agree that the Hearings Official should have addressed the applicability of the goal post rule issue.[1]

The Hearings Official discusses the goal post rule issue directly on pages 11 and 12 of the decision. In relevant part, the Hearings Official states:

> "While I understand the applicant's desire to decide the issue (the uncertainty regarding having to comply with provisions that are impossible to comply with could drive away potential developers), I think any decision on this issue would be speculative and advisory. The applicant and the City identify a number of potential EC provisions that they think could apply to any future building permits, but even if such provisions are likely to arise they have not yet arisen and there is no guarantee exactly which provisions may be at issue. The present application is for a conditional use permit to construct controlled income and rent housing, this application is not for building permits. Any speculation about what standards and criteria would apply to future building permits would be just that – speculation." Hearings Official's decision, p. 11.

The root cause of the Hearing Official's error was twofold. First, the Hearing Official believed that he could not decide the issue because it "would be speculative and advisory." Second, the Hearings Official believed that the Eugene code employs a two-step approval process and that

[1] See City Attorney memorandum to Fred Wilson, Hearings Official, July 15, 2016.

issues of code provision applicability would be decided during the second step of that process. As discussed below, neither of those beliefs is correct.

The Hearing Official's reticence to decide the issue appears to be grounded in the notion that there is no justiciable controversy to be decided, and, therefore, any decision on the matter would be an impermissible advisory opinion.[2] Any prohibition against advisory opinions applies to courts exercising their constitutional authority; it does not, however, apply to or limit the Hearings Official's authority to decide matters before him. The Hearing Official's authority is derived not from the state and federal constitution but from state statute (ORS 227.165) and the Eugene code (EC 9.724(2)). Neither of those sources of authority acts to prohibit the Hearing Official from deciding the issue raised by the City Attorney – i.e., What standards and criteria apply to the development implementing the approved CIR CUP? Likewise, the Planning Commission also has such authority and duty to decide this issue.

To the contrary, Oregon law requires that the Hearing Official (and the Planning Commission when appealed) make a decision on the matter. ORS 227.173(3) obligates the City to inform the applicant as to the standards and criteria "considered relevant to the decision" approving or denying the permit application. *See also* ORS 197.763(3)(a) providing that notice of application shall "list the applicable criteria from the ordinance and plan that apply to the application." Taken together, it is clear that the Hearing Official has an obligation to determine which standards apply to the permit application and which do not.

Before discussing the applicability of the goal post rule, it should be understood that there is a fundamental and legal difference between land use permits and building permits. Land use permits (planned unit developments, site review, conditional use permits, design review, traffic impact analysis review, variances, etc.) implement the comprehensive plan and the city's land use regulations (i.e. Eugene Land Use Code, Chapter 9) and are subject to the goal post rule. Building permits and other permits that implement the health and safety provisions of the Eugene Code, do not implement the comprehensive plan and the city's land use regulations. These permits are not subject to the goal post rule. In other words, the Planning Commissioners should understand that the fundamental health and safety requirements such as the City's fire code or Oregon's structural specialty code adopted by the City are not "land use regulations" Those building or construction standards do not implement the comprehensive plan and, therefore, do not fall within the definition of a "land use regulation" as defined by state statute (ORS 197.015(11)) and which land use regulations are frozen by the goal post rule (ORS 227.178(3)(a)).

The affordable housing that will be constructed on the property will meet all of the applicable health and safety standards in Eugene's current fire and building codes. However, what is

[2] The Applicant does not agree with the proposition that there is no justiciable controversy. The City Attorney has advised that the City will apply subsequently adopted land use regulations to the Applicants' building permits. Applicant contends that the City is prohibited from doing so under Oregon's goal post rule. *See Couey v. Atkins*, 357 Or 460, 484-523 (2015) for a comprehensive discussion regarding issues of justiciability and advisory opinions by the Oregon courts.

covered by the goal post rule are subsequently adopted land use regulations (characterized by the City as "development standards") that the City has indicated it intends to apply at the building permit stage. It is those standards and criteria that the fixed goal post rule precludes from being applied to development proposals implementing CIR CUP approval on the subject property so that the project can be realized as approved.

The Hearing Official's decision to forego making a decision on the applicable criteria and standards was based on his mistaken belief that the CIR CUP requirements of the old code involved a "two-step" approval process. They do not. There is only one step under the Eugene Code and that is to obtain a conditional use permit pursuant to EC 9.724. Thereis no other or further land use approval that an applicant must obtain. For example, there is no requirement under the Eugene Code for the applicant of a CIR CUP to subsequently apply for and obtain site review approval, a separate and distinct discretionary permit. If that were the case, then the goal post rule would act to freeze the standards and criteria at the time of the new, separate and distinct permit application. ORS 227.178(3)(a).[3] However, in this case, there never will be a second separate and distinct permit application because the code does not require one. The Applicant has already obtained permit approval as provided in the 2002 Eugene Code. That permit approval includes all development of the land. See ORS 227.215 ("development" includes "a building . . ., making a material change in the use or appearance of a structure or land, . . . , and creating or terminating a right of access.")

As discussed exhaustively in the Applicant's attached memorandum on the goal post rule, so long as development is consistent with the standards and criteria in effect as of April 8, 2002 (the date the application was originally submitted), the development is already approved and no further or separate land use approval is required. The goal post rule "implicitly requires that the city apply a consistent set of standards to the discretionary approval of the proposed development of land and the construction of that development in accordance with the discretionary approval." *Gagnier v. City of Gladstone*, 38 Or LUBA 858, 865 (2000).

> "[T]he approval of a 'permit' (i.e. 'discretionary approval of a proposed development of land'). . . carries with it the right to obtain the building permits that are necessary to build the approved proposed development of land, provided that the applicant seeks and obtains those building permits within the time specified in the permit itself or in accordance with any applicable land use regulations that establish a deadline for seeking and obtaining required building permits." *Gagnier* at 865.

III. Why the Planning Commission should approve this appeal.

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[3] The Hearing Official's decision intimates, without deciding, that the goal post rule applies to only freeze discretionary standards and criteria while leaving non-discretionary criteria subject to change No such limitation exists in the language of the goal post rule itself. Nor has it been applied that way. The goal post rule applies to both discretionary and non-discretionary standards and criteria. See *Gilson v. City of Portland*, 22 Or LUBA 343 (1991)(applying goal post rule to freeze a non-discretionary building height requirement)

There are two basic reasons why the Planning Commission should approve the Applicant's requested condition of approval. One is a legal argument; the other is a policy argument.

A. The requested condition is correct under the law.

As noted above, the Applicant and the City have presented detailed and lengthy legal arguments related to the application of the fixed goal post rule to this application and to subsequent applications to implement the CIR CUP approval. The Applicant's memoranda are attached to this statement and the arguments presented in those memoranda are hereby incorporated into this appeal statement.

In summary, case law interpreting ORS 227.178(3)(a) has held that the fixed goal post rule applies to subsequent building permit and development processes that implement the initial, broader land use application that approves a general use, such as the CUP here. The reasoning behind that is simple – it precludes the application of future changes to land use regulations that might prevent the development of a prior land use decision.

The Hearings Official's decision has already applied the principle set forth in the statute. Conditions of Approval 3, 7 and 8 expressly require compliance with the standards in effect at the time (the 2002 version of the Eugene Code and the November 1999 Eugene Arterial & Collector Street Plan street standards) instead of requiring compliance with the current standards. His authority to do so is provided under ORS 227.178(3)(a). It is indeed unfortunate that he chose to side-step the issue of whether to mandate consistency with ORS 227.178(3)(a) in all instances. The Planning Commission is the Hearings Official's back-stop; you have the authority to correct his error.

Planning Commission approval of this appeal and the imposition of the requested condition of approval is consistent with the legal analysis and precedent set forth in the attached memoranda and will ensure that the development envisioned in the approved CIR CUP can be realized.

B. The requested condition is good public policy supporting affordable housing.

The other reason the Planning Commission should approve this appeal rests on policy grounds. The Hearings Official elected to kick the can down the road so that future developers of needed housing on the property will have to litigate, case by case, standard by standard basis in any future development application. The Planning Commission can settle this issue here and now, thereby ensuring that affordable housing development organizations will know the applicable standards before they design a project rather than as a result of litigation.

Imagine the amount of litigation that could result if the site is developed through two or three phases? Affordable housing development organizations will have to negotiate with the City as to which standards from the old code apply and which standards from the new code apply. That decision can then be challenged by opponents on a standard by standard basis. The end result is

astronomical costs for a proposal for affordable housing, making it less likely that housing can actually be built or will actually be affordable.

A decision by the Planning Commission in favor of the Applicant would confirm that the old standards apply to future development proposals for needed housing on the subject property, eliminating years of costly litigation and providing the security developers of affordable housing need for project development.

This CIR CUP approval has the potential to shine the spotlight on the City of Eugene as a leader in affordable housing projects. The Planning Commission has the authority and the power to make that happen. The Applicant requests that you approve the appeal and impose the requested condition of approval.

Thank you for your consideration.

Sincerely,

Bill Kloos

Bill Kloos

Incl:

Memorandum - first
Memorandum - second

ARNOLD GALLAGHER
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July 8, 2016

Fred Wilson, Hearings Official
c/o Gabe Flock, Senior Planner
Planning Division
99 West 10th Avenue
Eugene, Oregon 97401

Re: Tim Wiper - Cathedral Park (CU 02-4)
Applicant's Response to Anne C. Davies Memorandum dated June 29, 2016

Dear Mr. Wilson:

This letter is submitted on behalf of Mr. Charles "Tim" Wiper ("Applicant") with regard to the above-referenced pending application ("Application"). This letter responds to the City's assertion that ORS 227.178(3) (i.e. the "Goal Post Rule") does not apply to "applicable development standards that are not CUP approval criteria." See the attached Letter from Anne C. Davies dated June 29, 2016, pg. 1 ("City Attorney Memo"). Please include this letter and the attached City Attorney Memo into the record on this matter. In addition, please include the attached copy of Eugene Code Chapter 9 (2002) in its entirety into the record on this matter.

The City Attorney Memo attempts to provide legal support for the June 2016 staff report ("Staff Report") statement that suggests that the 2002 CUP approval criteria of Eugene Code ("EC") 9.724 are the only code provisions with standards and criteria that are locked in by the Goal Post Rule and that the Application is subject to the City's numerous other land use regulations that were adopted subsequent to the Application being submitted on April 8, 2002. The Staff Report states as follows:

> "On a related not[e], staff anticipates that the City Attorney will provide a memo as part of the hearing process addressing the applicability of various standards at the time of any subsequent permit applications (in the event of approval of this CIR-CUP request) to help all the parties understand what the applicant's development will be held to in terms of newer regulations that have come into effect since 2002 such as the Multi-Family Standards at EC 9.5500, Goal 5 (/WR overlay) standards at EC

> 9.4900, Traffic Impact Analysis Review at EC 9.8650, and Stormwater Standards at EC 9.6790." Page 6.

While novel, the City's position is simply wrong. The City's position attempts to make a legal distinction between "standards" and "criteria" where none exists. The City Attorney Memo does the same:

> "The goal post rule and applicable caselaw do not preclude the city from applying, for a subsequent building permit, applicable development standards that are not CUP approval criteria. The goal post rule freezes the approval criteria that are applicable to the application at issue; it does not preclude the city from applying, during the building permit phase, all other subsequently adopted standards or regulations that are not part of the approval criteria applicable to the subject zone change or permit application."

In essence, the City is arguing that only "approval" criteria for the discretionary uses such as CUPs are subject to the Goal Post Rule, but that all other subsequently adopted "development" standards (whatever the City deems those to be), such as setbacks, height limitations, density requirements, stormwater standards, Goal 5 requirements, etc. are not fixed by the Goal Post Rule.

The City's position ignores the fact that while there may be a functional distinction between "approval" criteria and "development" standards, there is no legal distinction in the context of the Goal Post Rule. All rules of the game applicable to the Application are embodied in the City's 2002 Eugene Code Chapter 9 and are fixed and cannot be altered by subsequent land use regulations and amendments. The "approval" criteria of EC 9.724(2)(a)-(c) (2002) and all relevant and applicable "development" standards contained within the 2002 Eugene Code Chapter 9, such as building height, setbacks, density, etc. are fixed. The City cannot superimpose later-adopted land use regulations such as the new multi-family development standards (EC 9.5500), the new stormwater standards (EC 9.6790 through EC 9.6797), a new water resources conservation overlay zone (EC 9.4910), and the new traffic impact analysis (TIA) requirement (EC 9.8670).

The City's narrow interpretation conflicts with the plain text of the Goal Post Rule in context and relevant case law.

At the outset, the Applicant advised the Hearing Official that this application has not been favored by the City. Initially, the City refused to process the Applicant's application when it had no legal grounds to do so. Now, the City Attorney's office has drafted a memorandum advising that the City will impose the numerous, costly and restrictive land

use regulations subsequently enacted by it at the building permit stage. Not only is the City Attorney's memorandum wrong on this issue but the practical effect of the City Attorney's memorandum is to poison the land use approval well and scare off potential developers who now lack clarity as to whether building permits will be granted at all and if granted, what restrictions the City may impose that will either limit the approved development or greatly drive up the cost of development. As discussed in depth below, it is the Applicant's position that the only standards and criteria which apply to the approval of the development (including issuance of any construction or building permits) are those in effect as the time the application was submitted, if any. The Applicant respectfully requests a finding to that effect and condition of approval stating as follows:

> COA # ___: ORS 227.178(3)(a) applies to this CIR CUP approval and all development thereunder. All permits issued to implement development approved under this CIR CUP shall be issued consistent with standards and criteria in effect on April 8, 2002 ("2002 EC Chapter 9"), if applicable, which standards are exclusive. Any land use regulations adopted since April 8, 2002 are not applicable to this CIR CUP. Such standards that do not apply, include, but are not limited to, the Multiple-Family Standards at EC 9.5500, Goal 5 (/WR overlay) standards at EC 9.4900, Traffic Analysis Review at EC 9.8650 and Stormwater Standards at EC 9.6790 in the current Eugene Code.

As the Hearing Official is aware, the Applicant has requested to change the use of its property from cemetery to controlled income and rent housing and is seeking a discretionary permit under ORS 227.215 authorizing the proposed development.[1] Staff and the City Attorney have asserted that notwithstanding Goal Post Rule all later enacted standards and regulations (deemed by the City to be "construction and development standards") will be applied to the Applicant's approved development when the Applicant seeks the building permits necessary to implement that use. The Applicant contests that position. Under ORS 227.173, the Applicant is entitled to know all of the criteria and standards that the City will impose or intends to impose in connection with the approval of that development regardless of whether done at the discretionary permit application stage or when building/construction permits are pulled. *State ex rel. West Main Townhomes, LLC v. City of Medford*, 233 Or App 41, 48 (2009) (citing *Sun Ray Dairy v. OLCC*, 16 Or App 63, 71 (1973)). This issue is ripe for the Hearing Official to decide and the Hearing Official is required by law to decide the matter.

Moreover, without a decision from the Hearing Official on this matter, the Application is effectively dead as the City Attorney Memo has created such uncertainty with

[1] For purposes of ORS 227.215, "'development' means a building . . . [and] making a material change in the use or appearance of . . . land[.]"

respect to any approval as to scare off any potential developer willing to bring affordable housing to south Eugene.

I. Goal Post Rule – ORS 227.178(3)

The Goal Post Rules for cities and counties were originally adopted in 1983 as "protective" measures for both applicants and opponents of land use applications in order for all parties to know what the rules at play for a particular project would be. *Davenport v. City of Tigard*, 121 Or App 135, 141 (1993). Additionally, LUBA has stated that the Goal Post Rule "provides permit applicants protection from changing approval standards." *Kirpal Light Satang v. Douglas County*, 18 Or LUBA 651, 659 (1990). The Goal Post Rules have been broadly interpreted by the Oregon Court of Appeals to effectuate that purpose. *See generally, Davenport,* 121 Or App at 141.

The Goal Post Rule for cities reads as follows:

> "If an application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted." ORS 227.178(3)(a) (Emphasis mine).

As you are well aware, Oregon courts employ a three-step test when interpreting statutes. *PGE v. BOLI*, 317 Or 606 (1993) as modified by the Court's decision in *State v. Gaines*, 346 Or 160 (2009).

The first step of any statutory analysis is to examine the text and context together. *PGE v. BOLI*, 317 Or 606, 610 (1993)("[T]he text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent."). "[T]ext should not be read in isolation but must be considered in context." *Vsetecka v. Safeway Stores, Inc.* 337 Or 502, 508-510 (2004). Context includes "the context of the provision at issue, which includes other provisions of the same statute and other related statutes." *PGE* at 611. Related statutes include those enacted at the same time as or before the statute being construed, *Stull v Hoke*, 326 Or 72, 79-80 (1997), and include those statutes on the same subject, or statutes that directly or indirectly refer to each other. *State v. Betts*, 235 Or 127, 136-138 (1963).

The term "standards and criteria" is a term of art. The common understanding of the term is that it is the all-encompassing phrase meant to describe all the rules of the game

that apply to a particular development permit, such as the Application. "'Standards and criteria' is a statutory term; its meaning is a question of state law, and a local interpretation or application of it does not bind [LUBA or the Courts]." *Davenport*, 121 Or App at 140.

The individual words "standards" and "criteria" do not have distinct meanings in the context of the Goal Post Rule, nor do they generally. They are synonyms. *Black's Law Dictionary*, 7th Edition, defines "standard" as follows: "2. A criterion for measuring acceptability, quality, or accuracy." Pgs. 1412-1413. *Webster's Third New International Dictionary* (1986) defines "criterion" as follows: "**2 :** a standard on which a decision or judgement may be based." Pg. 538. *Webster's* defines "standard" as "**3 a :** something established by authority, custom or general consent as a model or example : CRITERION, TEST...***syn*** STANDARD, CRITERION, GAUGE (*or* GAGE), YARDSTICK, TOUCHTONE..." Pg. 2223. *See Friends of Parrett Mt. v. Northwest Gas Co.*, 336 Or 93, 107 (2003)(referencing BLACK'S LAW DICTIONARY to define statutory terms).

In context, it is clear that the Goal Post Rule applies to all relevant standards and criteria that govern the development of land, including "development" standards, not merely "approval" criteria for a use (as argued by the City). For example, ORS 227.173 requires cities to base decisions of a discretionary permit application to be based on "standards and criteria" set forth in the development ordinance and the comprehensive plan. ORS 227.173(1).[2] Furthermore, a city must identify approval "criteria and standards" for land use permits and expedited land divisions relevant to the decision and must explain its decisions based upon the facts and how those facts relate to the "criteria and standards" considered relevant to the decision. ORS 227.173(3); *BCT Partnership v. City of Portland*, 130 Or App 271, 276 (1994). The Applicant is entitled to know what the standards and criteria are prior to a decision being made, and those same standards and criteria remain fixed. There is nothing in the text or context of the Goal Post Rule to suggest that there is a meaningful difference between "standards" and "criteria" and to support the City's position that "development standards" are somehow exempt from the Goal Post Rule.

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[2] **Or. Rev. Stat. Ann. § 227.173**

(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.

(2) When an ordinance establishing approval standards is required under ORS 197.307 to provide only clear and objective standards, the standards must be clear and objective on the face of the ordinance.

(3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.

(4) Written notice of the approval or denial shall be given to all parties to the proceeding.

During the second step of statutory analysis, courts will consider any legislative history proffered for "whatever its worth - and whatever its worth is for the court to decide." *State v. Gaines*, 346 Or 160, 170-172 (2009). In this particular case, the Goal Post Rule was adopted as Section 27 of HB 2295 in 1983 as part of a major overhaul of Oregon's recently adopted land use system. The Applicant requested and reviewed the entire legislative history and found no substantive discussion of the provision. The legislative history is silent on this matter and is of no help to either side.

Assuming that after examining the text and context above (including any legislative history) there was still some doubt as to the meaning of the Goal Post Rule, the courts will employ general maxims of construction in aiding their interpretation. *State v. Gaines*, 346 Or 160, 164-165 (2009). Those maxims include the maxim that courts construe statutes so as to avoid absurd results, *State v. Walker*, 192 Or App 535, 541-542 (2004), and that courts presume that the legislature did not mean to enact a meaningless statute. *FDPPO v. Washington Co.*, 142 Or App 252, 259 (1996).

The City Attorney Memo's proposed interpretation is absurd. It would effectively obviate the very protection the legislature implemented when it adopted the Goal Post Rule. Instead, the City's interpretation would replace the very clear mandate under the Goal Post Rule that the rules (i.e. standard and criteria) governing an application's approval are frozen at the time the application is submitted with a complicated, bi-furcated system where some rules would be frozen while others were not. Under the City's interpretation a successful applicant at the discretionary permit stage would only be assured of "half a loaf" (i.e. approval of the use) with the other "half a loaf" (i.e. build out of the approved use) subject to whatever later enacted "construction and development standards" the City may choose to adopt and apply. Under the City's interpretation, the protections the legislature sought to implement by adopting the Goal Post Rule are illusory because any subsequently adopted legislation could "move the goal posts." In other words, the City is arguing for an interpretation that would render the Goal Post Rule's protection a "meaningless act."

II. Analysis of Caselaw Applying the Goal Post Rule

A. Caselaw Not Cited by the City Attorney

While the City Attorney Memo cites multiple cases (discussed in Section II.B below) to support its position, it does so in a very casual manner and, perhaps more importantly, fails to cite and analyze three cases that settle the question in the Applicant's favor. To be sure these three cases, analyzed below, contradict the City's position as do the cases cited by the City.

i. *Pete's Mountain Homeowners Ass'n v. Clackamas County,* 227 Or App 140 (2009)

The most recent Oregon Court of Appeals case dealing with the Goal Post Rule stands for the proposition that development standards, such as minimum lot size restrictions, are "standards and criteria" within the meaning of the Goal Post Rule. *Pete's Mountain Homeowners Ass'n v. Clackamas County*, 227 Or App 140, 148 (2009). In addition, not only are development standards (such as minimum lot size restrictions, building height, density requirements, setbacks, and the like) "standards and criteria" but Measure 37 waivers themselves are standards and criteria within the meaning of the Goal Post Rule. *Pete's Mountain Homeowners Ass'n.*, 227 Or App at 148.

The Court of Appeals held: "On the one hand, the goal-post statute provides that, once petitioners' application was completed, the standards and criteria that applied at the time—including, as we have held, their Measure 37 waivers—cannot be changed." The fact that a Measure 37 waiver, which is clearly not an "approval" criterion, and in fact is really the absence of "approval" criteria and "development" standards (such as the 80-acre parcel minimum), has been held by the Court to be "standards and criteria" for purposes of the Goal Post Rule clearly destroys the City's argument. The term "standards and criteria" is to be read and applied broadly, not narrowly as the City posits. The City's position and the holding in *Pete's Mountain Homeowners Ass'n* are mutually exclusive.

ii. *Davenport v. City of Tigard,* 121 Or App 135 (1993)

In 1990 the City of Tigard denied an application for an apartment development due to "traffic safety" concerns related to the condition and classification of the streets and intersections serving the subject property. On September 12, 1991 the city adopted a new comprehensive plan transportation map that changed the classifications of certain streets serving the subject property and designated new streets and street extensions. On September 13, 1991, petitioners submitted a new application for approval of a 348-unit apartment development. The city approved on April 28, 1992 and applied the newly-adopted transportation map and development code provisions.

The Court of Appeals ultimately concluded as follows:

> "that the term 'standards and criteria,' as used in ORS 227.178(3) and ORS 215.428(3), is not limited to the provisions that may be characterized as 'approval criteria' in a local comprehensive plan or land use regulation....The role that the terms play in both statutes is to assure that both proponents and opponents of an application that the substantive factors that are actually applied and that have a meaningful impact on

> the decision permitting or denying an application will remain constant throughout the proceeding [internal citations omitted]. That protective purpose of the statute would not be served by our adoption of the restrictive meaning that petitioners would give the term." *Davenport v. City of Tigard*, 121 Or App 135, 140 (1993) (Emphasis mine).

LUBA and the Court rejected petitioners' argument, which is similar to the City's argument in the present case, that the amended map did not contain "standards and criteria" within the meaning of the Goal Post Rule. A transportation plan map is certainly not "approval" criteria in the functional sense (as opposed to the "approval" criteria of EC 9.724(2)(a)-(c) (2002)). But according to LUBA and the Court in *Davenport*, the transportation map fell within the term "standards and criteria" for purposes of the Goal Post Rule.

iii. Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651 (1990)

There is a long line of "*Kirpal Light Satsang*" cases dealing with the same set of facts. These relevant facts[3] are as follows: Property owner submitted documents to the county for the purpose of obtaining building permits to develop the property for a private school in the Farm-Forest (FF) zone, on September 2, 1987. On the date the documents for the private school were submitted, the FF Zone allowed as an outright permitted use "schools" but did not make a distinction between private and public schools. On September 9, 1987 the county amended its land use and development ordinance to make private schools a conditional use rather than a permitted use in the FF zone. The county argued that the documents submitted on September 2, 1987 were not an "application" for a "permit" that is subject to the county Goal Post Rule (ORS 215.428(1)). After the Oregon Court of Appeals remanded the case to LUBA, LUBA found that the property owner's September 2, 1987 documents did in fact constitute an "application" for a "permit" that was entitled to the protections of the Goal Post Rule. *Kirpal Light Satsang*, 18 Or LUBA at 659-660.

The county argued that the September 2 documents were not an "application" for a statutory "permit" because on September 2, 1987, a school was a nondiscretionary outright permitted use. LUBA disagreed and found that there was legal and factual judgment necessary to determine whether what was proposed qualified as a private school under the terms of the county land use regulations. LUBA held:

"Based on our conclusion that the county decision required to approve or deny petitioner's September 2, 1987 application involves significant discretion, we conclude that petitioner's application was for a "permit" as that term is defined in ORS 215.402(4) and, therefore,

[3] See *Kirpal Light Satag v. Douglas County*, 96 Or App 207 (1989) for a fuller set of facts.

petitioner was entitled to have a permit application judged by the approval criteria **and** standards in existence on September 2, 1987." *Kirpal Light Satang*, 18 Or LUBA at 663 (Emphasis mine).

As an outright permitted use, there were no "approval" criteria similar to the approval criteria for a CUP or other discretionary, conditional land use applications, such as the one in question in this case. However, there are of course "development" standards that address dimensional minimums and maximums and operations such as setbacks, heights, buffers, floor area ratio, hours and manner of operations, parking, circulation, access, noise, light and drainage. LUBA (and the Court of Appeals) held that the Goal Post Rule applies to both "approval" criteria and "development" standards. If the City's position had any merit in this proceeding, LUBA (and the Court of Appeals) would not have held that the Goal Post Rule applied in *Kirpal Light Satsang* because there were no applicable "approval" criteria for the outright permitted use of a private school. The nonexistence of "approval" criteria is itself a standard by which the application is judged. *See also, Pete's Mountain Homeowners Ass'n*, 227 Or App 140 (1990) (wherein the court held that a Measure 37 waiver (i.e. the nonexistence of standards and criteria) is a standard and criteria for which the local government must judge an application).

B. Caselaw Cited by the City Attorney Memo

i. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000)

In *Gagnier*, the property owner applied for a variance to allow for a zero setback for a duplex to be constructed on his property. The variance was originally approved in July 1999 and was valid for one year. After the approval of the variance, the uses permitted in that zone (R-5) were changed in February 2000, with an effective date in March 2000, to prohibit the duplex approved in the 1999 approval. In February 2000, the property owner applied for his building permit. The permit was conditionally approved, but the city required that certain conditions had to be met prior to the effective date of the zoning change. Although the petitioner met those conditions by that deadline, he was not able to get the county to issue the permit prior to the deadline passing.[4] Subsequently, the county advised the property owner that it would not issue the building permit due to the new zoning ordinance.

In overturning the city's denial, LUBA held that the Goal Post Rule compels the city to issue the building permit(s) that were necessary to effectuate the already approved variance based upon the standards in effect at the time of the application. Yet, the City Attorney Memo reads this holding vary narrowly to say that:

> "[T]he city may not apply development standards at the building permit phase, where to do so would result in denial of a project

[4] The City of Gladstone had an agreement in place that Clackamas County would process and issue building permits after the city determined that the building permit complied with the city's code.

> that was previously approved in the processing of a land use application. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000). Therefore, where strict compliance with one or more of the multi-family standards from EC 9.5500 would require denial of the proposal, some of the multi-family standards may not apply." Pg. 3.

Contrary to the City Attorney Memo's general proclamations, the actual holding is not limited to only those cases where the building permit would effectuate a denial of the original approval. The holding is much broader than that. Rather, the Goal Post Rule "*compels* the city to apply a consistent set of 'standards and criteria' to both to the variance application and to the application to construct the use proposed in the variance application." *Gagnier* at 867 (Emphasis mine). That compulsion applies regardless of whether the later enacted standard would deny, limit, alter or have no effect whatsoever on the already approved development.

"The purpose of [the Goal Post Rule] is to assure that 'the substantive factors that are actually applied and that have a meaningful impact on the decision permitting or denying an application will remain constant throughout the proceedings.'" *Gagnier* at 864. The Goal Post Rule "implicitly requires that the city apply a consistent set of standards to the discretionary approval of the proposed development of land and the construction of that development in accordance with the discretionary approval." *Gagnier* at 865. (Emphasis mine). "[T]he approval of a 'permit' (i.e. 'discretionary approval of a proposed development of land'). . . carries with it the right to obtain the building permits that are necessary to build the approved proposed development of land, *provided* that the applicant seeks and obtains those building permits within the time specified in the permit itself or in accordance with any applicable land use regulations that establish a deadline for seeking and obtaining required building permits." *Gagnier* at 865. (Emphasis in original) The Goal Post Rule "compels the city to apply a *consistent* set of 'standards and criteria' to both the [original] application and the application to construct the use proposed in the [original] application." *Gagnier* at 867. (Emphasis mine).

Of additional import in the *Gagnier* case is the fact that the city made a similar argument as the City does in this case – that the variance did not "approve" a specific use, but the variance merely approved a variance from the front yard setback requirement. According to the city in *Gagnier*, because the city did not approve the duplex through the variance process, the city's action to deny the building permit to construct the duplex "did not effectively deny the variance." *Id* at 866. LUBA rejected the City argument stating:

> "In order to obtain a variance, petitioner submitted a proposal for a particular use, along with sufficient information about that use to allow the city to approve or deny the variance...The city does not contend that the duplex proposed in the building

> permit application differs material from the duplex proposed in the variance application, such that the variance approval no longer applies. Under these circumstances, the proposal for a duplex was a 'substantial factor' in the city's variance approval." *Id* at 866-867 (citing *Davenport v. City of Tigard*, 121 Or App 135, 141 (1993)).

Similarly, the City in the present case is arguing that the CUP, if approved, will not be developable without showing conformance with other land use development standards (adopted after the Application was submitted in 2002). The City seems to be arguing that an approval of the CUP still requires the Applicant to address other land use regulations (labeled by the City as "construction" or "development" standards) even though such standards did not exist in 2002.

The *Gagnier* case is on point and controls the outcome in the case at hand – the City is compelled to "apply a consistent set of standards to the discretionary approval of the proposed development of land and the construction of that development in accordance with the discretionary approval." *Gagnier*, 38 Or LUBA at 865 (Emphasis mine).

ii. *Gilson v. City of Portland*, 22 Or LUBA 343 (1991)

Continuing its trend in citing cases that actually support a different conclusion than that advanced by the City, the City Attorney Memo cites *Gilson v. City of Portland*, 22 Or LUBA 343 (1991), for the proposition that "unless a site plan for the proposed CIR CUP application specifically addresses development standards that were in effect in 2002, then development standards that are not part of the applicable CUP approval criteria are not locked in by the goal post rule." Pgs. 2-3.

In *Gilson,* the petitioner challenged a Portland City Council order approving a property owner's development plan. The property owner intervened on the side of the city. In 1990, the property owner submitted, and ultimately received approval in 1991, for a PUD. The proposal requested multiple building height and building story variances. Prior to approval, the property owner withdrew its building height variance requests. On January 1, 1991, the applicable zoning code was revised. This revision apparently increased the maximum building height within that zone. The petitioner brought this suit arguing that since the approved height of the structures on 18 of the lots exceeded the 1990 height limitations of the zone and no variances were approved, therefore, the city erred in approving the PUD.

In *Gilson,* the City of Portland unsuccessfully advanced a substantially similar argument to that which the City is now advancing:

> "[City of Portland] further contend[s] the height limitation of the underlying zone will be an applicable standard when

> applications for building permits for the structures within the PUD are submitted, and that the applicable height limitation will be that in effect when such building permit applications are filed. According to [City of Portland and the property owner], ORS 227.178(3) only gives an applicant a right to have an application reviewed under the standards applicable to that application when it was submitted. It does not give an applicant the right to have all subsequent applications for separate-approvals (e.g., design review or building permits) reviewed under the standards in effect when the initial application was submitted." *Gilson*, 22 Or LUBA at 348.

In rejecting the City of Portland's arguments and remanding the city's order approving the PUD, LUBA held that compliance with underlying zoning requirements is an approval standard for a PUD preliminary development plan and under the Goal Post Rule, even if the standards are later changed in the favor of the property owner, the underlying requirements of the zoning at the time of application are part and parcel of the initial development plan.[5]

The City Attorney Memo argues that *Gilson* stands for the general proposition that:

> "[U]nless the site plan . . . specifically addresses development standards that were in effect [at the time of application], then development standards that are not part of the applicable CUP approval criteria are not locked in by the goal post rule." Pgs. 2-3.

Gilson does not limit the Goal Post Rule to freezing only those criteria specifically addressed in the site plan as the City Attorney Memo suggests. Rather this case stands for the proposition that *all* of the underlying requirements that pertained to the zoning *at the time of application* apply to the subsequent development. It does not matter if those requirements are later changed to be more or less favorable to the property owner; if there are requirements tied to the zoning at the time of the application, those zoning requirements become part of the approval. Zoning requirements (including those the City Attorney Memo regards as "construction and development standards") are part of the "standards and criteria" that are covered under and frozen by the Goal Post Rule. It should be noted that the 2002 EC did not require an applicant for a CIR CUP to obtain any other discretionary land use approvals such as a site plan.

iii. ***DLCD v. Jefferson County*, 220 Or App 518 (2008) ("*Burk*")**

[5] *See also, Friends of Yamhill County et al. v. Oregon Dept. of Agriculture et al.* 2012 WL 4575980 (holding that post application statutory changes enlarging safe harbor for wineries as permitted use were inapplicable under Oregon's Goal Post Rule.)

In *DLCD v. Jefferson (Burk)*, the prior owner of the property at issue had a valid claim for compensation under Measure 37. However, when the county and state approved his claim, they elected "to 'waive' the offending land use regulations." *Burk*, 220 Or App at 520. The owner then filed an application for development of that property, but while the application was still under consideration, the property owner died. Although the county approved the development plan, on appeal LUBA held that the county erred based on the argument that Measure 37 waivers are personal to the property owner and are not transferrable to the estate. *Burk*, 220 Or App at 521.

The Court of Appeals held that ORS 215.427(3)(a) does not "vest" Measure 37 waivers so that they may pass to the estate upon the property owner's death. *Burk*, 220 Or App at 525. In making its ruling, the Court noted that "[I]t is important to emphasize the narrowness of the issue before us . . . [Does] ORS 215.427(3)(a)[goal post rule] . . . independent of Measure 37, create[] a vested, transferrable right in the continued viability of a waiver, even after the death of the person who originally obtained it." *Burk*, 220 Or App at 523. The Court narrowly answered that question – No.

The City asserts that *Burk* stands for the proposition that, "[T]he goal post rule applies to the application as filed." Pg 1 (Emphasis mine). That is only partially correct. The actual language of the case goes on to state the Goal Post Rule applies to the application "as filed or as supplemented within a limited period of time." *Burk*, 220 Or App at 524. (Emphasis mine) After that limited time, the statute does not apply if the substance of an application changes in a material way. *Burk*, 220 Or App at 524. In *Burk*, the underlying facts changed; the land use regulations did not. The law stayed the same but, with the death of the prior property owner, the applicant became the personal representative of the estate and that applicant did not have the statutory authority to obtain the permit under the Measure 37 claim.

Apart from the City's failure to state the entire rule expressed by the Court, this case is also supportive of the Applicant's position in the following ways. "By its terms, [ORS 215.427(3)(a)] ensures that an applicant who has otherwise fulfilled the statutory requirements will be subject to the standards and criteria that were applicable at the time the application was first submitted." *Burk*, 220 Or App at 523 (internal citation omitted) (Emphasis mine)). "[O]nce an application has been completed in a timely fashion, state and local governments may not enact new legislation that alters the criteria by which the application may be approved or denied." *Burk*, 220 Or App at 523 (citing *Sunburst II Homeowners Ass'n. v. City of West Linn*, 101 Or App 458, 461 (1990) (stating that the effect of the goal-post statute is that "persons who file applications before more restrictive legislation is adopted are entitled to have the earlier law applied to their applications").

The Court's decision in *Burk* is important because in the present case the Applicant timely supplemented its original application and is entitled to have those supplemented portions be frozen under the Goal Post Rule as well.

iv. Tuality Lands Coalition v. Washington County, 22 Or LUBA 319 (1991)

In 1988, the property owner submitted an application to develop a parcel of property as an asphalt batch plant. The county approved that application, but indicated that final approval "shall be obtained through the Type I procedure. A development application, accompanied by two sets of final plans, necessary written material and documents, and application fee shall be submitted." *Tuality*, 22 Or LUBA at 321. The approval also included several steps the applicant had to go through prior to construction and operation of the plant. In October 1990, the parcel was re-zoned from industrial to "future development." The industrial zoning permitted the proposed asphalt plant, but the future development zoning did not. In December 1990, the property owner submitted a second development application, purportedly to meet the requirements of the first application. The second application proposed different features than were approved in the original application. The second application was approved as was a subsequent building permit. The original approval was not appealed, but the second approval and the issuance of the building permit were.

LUBA held that the second application was a distinct and subsequent discretionary application and, therefore, was subject to review under the applicable requirements of the new zoning which prohibited the proposed batch plant.[6] "[T]here is nothing in [the goal post rule] which requires the county to apply the standards in effect at the time one application is submitted to a distinct and subsequent application." *Tuality*, 22 Or LUBA at 329. In determining that there were in fact two discretionary permit applications, LUBA relied on the following facts:

> "In addition to separate application forms, the existence of a second application is confirmed by (1) the County's statement in its 1989 staff report and decision of the need for the applicant to file another 'application' to follow up on the [1989 development approval decision], (2) [i]ntervenor's own characterization of the material it submitted in December 1990 as an 'application,' (3) the fact that two applications were subject to different review procedures (the first [development] application was assigned to be processed under a Type II process, while the second application was assigned to 'Procedure Type' I), (4) separate and different findings of fact and conclusions of law, and (5) each application led to a decision which was subject to a separate appeal process and period." *Tuality*, 22 Or LUBA at 329.

[6] In reversing the county's approval, LUBA held that "applicable requirements of the FD-10 zone, including the list of uses allowed in that zone, are "standards and criteria" as those terms are used by ORS 215.428(3)." *Tuality*, 22 Or LUBA at 329.

That is not the situation here. There is only one discretionary permit application before the City and any subsequent building permit would be for development approved in the currently pending Application.

Again the City Attorney Memo has altered and expanded the holding of the case to say something other than what it says. To wit, the City Attorney Memo argues that under *Tuality,* "[W]here land use approval does not result in overall master plan approval that governs all future aspects of the development, the goal post rule does not lock in development standards that are not applicable substantive approval criteria." Pg. 3.

Tuality did not impose the "master plan approval" rubric the City Attorney Memo advocates. Rather *Tuality* said that there was not a master plan approval process for siting an asphalt plant. *Tuality*, 22 Or LUBA at 324. *Tuality* only used that terminology to distinguish this case from *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990). The *Tuality* case turned on the fact that the property owner submitted a second, discrete land use permit "application" that was deemed to be a "distinct and subsequent application." As there is no second development permit application before the City asking for a different discretionary use, *Tuality* has no application to the case at hand.

v. Rivera v. City of Bandon, 38 Or LUBA 736 (2000)

In *Rivera,* petitioner applied for and obtained a conditional use permit in 1990 to build a single family dwelling. With the original permit, petitioner did not submit building plans. The permit was approved, provided the "plans do not exceed the height limitation." *Rivera*, 38 Or LUBA at 755. At the time of application for the 1990 conditional use permit, the building code regulations stated that the maximum building height was measured "from the floodplain or native ground elevation, whichever is higher." *Rivera*, 38 Or LUBA at 753-54. On October 8, 1991, that building code regulation was changed to indicate that building height was to be measured from "native ground level or grade." *Rivera*, 38 Or LUBA at 755. On October 31, 1991, petitioner submitted building plans showing a house measuring 28 feet from native grade. *Rivera*, 38 Or LUBA at 755. There were subsequent revisions to these plans, but ultimately the house was built measuring 33 feet from the top of the foundation footings to the top of the roof. *Rivera*, 38 Or LUBA at 738. The petitioner alleged that the native elevation of the property was 15 feet above sea level and that the top of the house measures 28 feet from that level which complied with the height limitation. *Rivera*, 38 Or LUBA at 747. The city ultimately took the position based on the evidence before it that the native elevation of the property was only 10 feet above sea level and therefore the house measure 33 feet which was 5 feet in excess of the allowed height limitation. *Rivera*, 38 Or LUBA at 745. In 1998, the city planner determined that because the house exceeded the 28 foot height limitation, a new conditional use permit was required. The petitioner prepared and filed a new conditional use permit. The planning commission

subsequently determined that requirements for the 1998 conditional use permit were not satisfied[7] and denied the application. *Rivera*, 38 Or LUBA at 743.

On appeal, LUBA held that there was substantial evidence in the record to allow a reasonable decision maker to find that the native grade of the property at the time of application, in 1990, was 10 feet.

The City Attorney Memo argues that under *Rivera*, "[a]s a general matter, the goal post rule does not apply to construction and development standards where the land use approval does not address the facts relevant to those standards." Pg. 1. Again, the City Attorney Memo reads more than is there. This case was really about a factual dispute over whether the native grade of the property was 10 or 15 feet. Ultimately, LUBA determined that the city's determination of 10 feet was sufficiently supported by the evidence in the record. *If* LUBA had determined that the native grade was 15 feet, that would have resolved the case in the petitioner's favor, but that was not the outcome.

This case is similar to *Tuality* in that LUBA was not willing to extend the protections afforded to applicants for a particular land use permit when other, discrete land use permits are required in order to develop the property as proposed. As in *Tuality*, in *Rivera*, LUBA found that two discrete land use permit applications were in play and that the land use regulation standards and criteria that applied in the earlier approved application did not fix the goal posts for the subsequent land use permit applications. As stated above, there is no requirement in the 2002 EC Chapter 9 for a CIR CUP to provide site plans, master plans, or any other discrete land use application. The standards and criteria applicable to a CIR CUP are found exclusively in the 2002 EC Chapter 9.

III. Conclusion

The City's position that the Goal Post Rule only applies to "approval" criteria and does not fix the "development" standards at the time the application is first submitted, is simply wrong. The Goal Post Rule protects applicants from subsequent changes to all rules of the game whatever they are called. All land use regulations, including development standards, are fixed as of the date the application is first submitted. None of the cases cited in the City Attorney Memo contradict the Applicant's conclusion.

The Applicant respectfully requests that you reject the City's position and specifically adopt the Applicant's proposed condition of approval that affirms the Applicant's position and that is consistent with caselaw.

Very truly yours,

[7] Approval of a conditional use permit required that the portion of the house above 28 feet (the building height limitation) did not "adversely affect the ocean or river views of existing structures on abutting lots."

Micheal M. Reeder

MMR:jgh
Attachments
N:\P - T\Rest Haven 9019\Rest Haven Development 0919-35\CIR CUP Application\Reeder Goal Post Rule Ltr to HO 070816.docx

BEFORE THE EUGENE HEARINGS OFFICIAL

In the Matter of the Application of Charles Wiper, Inc. for a Conditional Use Permit authorizing development of 172 units of Controlled Income Rent (CIR) housing on Map 18-03-18-00, TL 300, (CU 02-4).	)))))	Applicant's Final Argument

The record on this matter spans more than a decade and many hundreds of pages. Progress is being made it seems. Whereas the City was initially so out of sorts with this application that it refused to process it at all, the applicant and the City have moved to the point where they are discussing the finer points of conditions to accompany an approval.

Final List of Conditions: Accompanying this argument, in letter form, is the applicant's final list of recommended conditions of approval. These incorporate changes to reflect what we have learned through the balance of the proceeding. Each condition is accompanied by a short explanation of why the proposed language is correct and also reconciling our final proposal to the differences in the conditions recommended by the City.

June 29 Hearing Memorandum: We also recommend to the Hearing Official our June 29 Hearing Memorandum. That memo reaches back in time to identify and summarize the key documents in this proceeding. That references a May 20, 2016, Memorandum explaining the standards that apply and explaining what the standards mean, based on legislative history and local case law. The May 20 Memorandum succinctly summarizes the Applicant's position on the law. Note that it references and borrows liberally from the 19-page Memorandum dated May 12, 2002, which appears at pages 88-313 of the LUBA Record. Both memoranda are an essential starting point for review of this Application. Both are referred to in footnote 1 of the Staff Report.

Needed Housing Statute: Our First Supplemental Supporting Statement for this application, which appears at page 59 of the LUBA record, invoked the Needed Housing Statute in support of approval. See LUBA Rec at 63. The version of statute that applies is the version that was in effect in 2002 when the application was filed. The goalpost statute applies to state law as well as local law. *Testa v. Clackamas County*, 137 Or App 21, 903 P2d 373, *rev denied* 322 Or 420 (1995).

The version of the Needed Housing Statute in effect in 2002 defined "needed housing" as:

> "On and after the beginning of the first periodic review of a local government's acknowledged comprehensive plan, "needed housing" also means:
>
> (a) Housing that includes, but is not limited to, attached and detached single-family housing and multiple family housing for both owner and renter occupancy;
>
> (b) Government assisted housing;"

And, when an application is for "need housing," ORS 197.307(6)(2001) required:

> "Any approval standards, special conditions and the procedures for approval adopted by a local government shall be clear and objective and may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

The import of ORS 197.307(6) is that the City may not apply standards or conditions that are not clear and objective. Code provisions that flunk the test to be applied include that call for subjective value judgments, of course. Code provisions that are so ambiguous that they can be interpreted to either approve or deny the use also flunk the test and may not be applied. See, e.g., *Group B, LLC v. City of Corvallis,* __ Or LUBA __ (2015), *aff'd without opinion* 275 Or App 577, 366 P3d 847 (2015), *rev den* (No. S063840, May 26, 2016)(ambiguous condition on 1981 approval could not be applied); *Walter v. City of Eugene*, __ Or LUBA __ (LUBA No. 2016-024, June 30, 2016)(ambiguous standard may not be applied).

In summary, the Needed Housing Statutes applies as follows:

1. It applies directly to decisions regulating development of Needed Housing on land on the BLI.
2. Under the default provision of ORS 197.307(6)(2001) [now ORS197.307(4)], the City may only apply clear and objective standards, conditions and processes.
3. Those standards and conditions "may not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay." ORS 197.307(6)(2001) [now ORS 197.307(4)].
4. The City may have an alternative track regulating "appearance and aesthetics" that it applies to applicants. ORS 197.307(4) [now ORS 197.307(6)].
5. The City may only apply the alternative track discretionary standards for appearance and aesthetics if the applicant retains the option to proceed under clear and objective standards. ORS 197.307(6)(a).

In considering this application, the Hearing Official should be on the lookout for situations where the dispute between the applicant and the City relates to a discretionary call about subjective or ambiguous standards. These standards may not be the basis for denial. He should also reject any proposed conditions that will call for the exercise of discretion in the future in implementing this approval. And, finally, he should reject any conditions that will require expensive work to be done in the future that will not generate information that is a substantial benefit to the project – that is, the cost or delay associated is unreasonable for the benefit to be gained.

Goalpost Statute: As is apparent from the record, and as explained at the hearing, the Applicant filed when it did in 2002 to get the benefit of the standards in effect at the time of the filing. In the City Attorney memo dated June 29, the City took the position that the "Goalpost Statute" does not really set the goal posts. It leaves the door open for the City to adopt new or amended regulations after the date of the filing and then apply those standards to the project that is actually developed under this approval.

The City Attorney opinion was responded to in detail by the Applicant on July 8. The City responded to our July 8 memo on July 15. However, nothing in the City's July 15 memo changes the Applicant's position. The Applicant does not wish to rehash the same arguments made in its July 8 memo, but it should be understood that the Applicant vehemently disagrees with the City's claim that the Applicant misreads the *Gagnier v. City of Gladstone* case. In fact, if the Hearings Official reads only one of the cited Goalpost cases, the Applicant suggests he take a careful look at *Gagnier*. Contrary to the City's claim, it most assuredly supports the Applicant's position. In fact, the Applicant posits that it is the City that cherry-picks a phrase from the case to support its untenable position. The City takes the phrase "the protection provided by the [goal post rule] is not open-ended or absolute" from the case to suggest that *Gagnier* is not supportive of the Applicant's position. However, please read this phrase in context:

> "We believe the approval of a 'permit' (*i.e.* 'the discretionary approval of a proposed development of land') under ORS 227.160(2) and 227.178(3) carries with it the right to obtain the building permits that are necessary to build the approved proposed development of land, *provided* the applicant seeks and obtains those building permits within the time specified in the permit itself or in accordance with any applicable land use regulations that establish a deadline for seeking and obtaining required building permits. The building permit in this context performs a similar role to final plat approval following approval of a tentative subdivision plan (internal citations omitted). In that way, the ORS 227.178(3) requirement that an application for discretionary approval of a proposed development of land be judged by the standards that are in effect when the discretionary permit application is submitted is not rendered meaningless by having the discretionary 'permit' decision *approved* under one set of standards and the building permits that are needed to make any use of the discretionary permit *denied* under a subsequent set of standards. Again, the protection provided by ORS 227.178(3) against changing land use standards is not open-ended or absolute; the permit applicant must seek and obtain building permits within the time specified in the permit itself or applicable land use regulations. However, if the permit applicant does so, he may not be denied such a building permit based on a change in applicable land use regulations that postdates the application for the discretionary permit." *Gagnier* at 865-866 (Emphasis in original).

It should be emphasized that based on case law, the absence of a standard is a standard. In this case, under the 2002 Eugene Code, the Applicant was not required to obtain multiple discretionary permits. Had the 2002 Eugene Code required the Applicant to apply for and obtain discretionary permits in addition to the CUP applied for (such as a PUD or Site Review), and had the Applicant not made such application at the time, then perhaps the Goalpost statute would not apply to the discretionary permits not applied for. However, in this case, no additional discretionary permits were required; therefore, they are not required now.

With all that said, we touch on the highpoints here.

The core of the City Attorney's pitch is a labeling exercise. Whereas the goalpost statute refers to "standards and criteria," the City Attorney uses the term "development standard" to refer to new or amended standards and criteria that the City wants to apply in the future despite the statute. "Development standards" in the City's parlance are really just "standards and criteria" with different labels.

The four substantive areas of concern to the City are: Multi-Family Standards adopted in 2002; Goal 5 standards adopted in 2005; Stormwater Standards adopted in 2006; and TIA standards adopted in 2002.

Multi-Family Standards in EC 9.5500: The Applicant's counsel explained at the hearing that it was the prospect of the impending Multi-Family standards in 2002 that prompted the filing of this application. The reason is that this project can't comply with the standards. For example:

Street Frontage. EC 9.5500(4)(b) sets building frontage requirements on Willamette Street that can't be met:

> "On development sites that will result in 100 feet or more of public or private street frontage, at least 60 percent of the site frontage abutting the street (including required yards) shall be occupied by a building(s) or enhanced pedestrian space with no more than 20 percent of the 60 percent in enhanced pedestrian space, placed within 10 feet of the minimum front yard setback line."

Block Requirements. EC 9.5500(10)(a) would require creating city blocks throughout this site, with attendant impacts trees, topography and neighbors' buffering.

> "Block Structure. Multiple-family developments 8 or more acres in size shall be developed as a series of complete blocks bounded by public or private streets. Natural areas, waterways, high voltage power lines, and other similar substantial physical features may form up to 2 sides of a block. The maximum block size within a multiple-family development shall be no greater than 4 acres in size. **(See Figure 9.5500(10) Multiple-Family Block Requirements.)"**

Vehicle Parking; Parking Courts. EC 9.5500(12)(b) sets design standards for "parking courts" that would radically change the site design and push development closer to the neighbors.

> "Parking Courts.
> 1. Maximum Size of Parking Courts. Individual parking courts shall be no more than 9,000 square feet in size and shall be physically and visually separated by a landscape area a minimum of 20 feet in width. No

more than 3 individual parking courts may be connected by an aisle or driveway. **(See Figure 9.5500(12) Multiple-Family Parking and Multiple-Family Parking Continued.)**

2. Parking Court Width. A parking court of any length shall consist of no more than one 1 double-loaded parking aisle.

3. Parking Court Separation. Planting islands shall be placed between parking courts to visually interrupt rows of parked vehicles and to separate individual parking courts. Planting islands between parking courts shall have a minimum width of 20 feet and a minimum area of 360 square feet. Each of these islands shall provide at least 1 canopy shade tree having a clear trunk height of at least 9 feet. Architectural elements such as trellises, porches, and stairways may extend into planting islands between parking courts. Other parking area landscape standards in EC 9.6420 Parking Area Standards also apply. **(See Figure 9.5500(12)(b) Multiple-Family Parking Courts)"**

The City Attorney contends that the very standards that triggered this Application are standards that can be applied to development permits anyway. The only concession from the City Attorney is that the Multi-Family Standards may not be applied to prevent the use. That concession would give the City a powerful discretionary wand to wave in order to reshape the development plan substantially to its liking, contrary to the Needed Housing Statute. It would invite litigation among the City and the neighbors and the developer about how much change in the plans is too much change.

Goal 5 Standards: The City included the 2005 Goal 5 Ordinance with its July 8 post-hearing submittal.[1] The Ordinance would create a "hands off" status for two features on the site. One is a drainage on the site flowing east; this is proposed to be impacted by this project. The other is a drainage in the southwest corner of the site; this is proposed to be piped in connection with utility plans and diversion of storm water.

To say that that this ordinance must be applied is to say that the project can't be approved as proposed, due to criteria and standards that were adopted after this application was filed. If the Hearing Official were to agree with the City that this regulation can be applied, who would determine how it is to be applied. Would this whole project be denied later? Would the project have to be amended? Who would be in charge of the changes needed to comply with the Goal 5 regulations?

Stormwater Standards: This application is similarly situated with regard to the 2006 Stormwater Ordinance and administrative regulations adopted to implement the ordinance. Those regulations require on site detention and treatment of storm water. Both of those functions consume a lot of real property. If the City requires compliance with these standards, it is not all

[1] The City has included with its Goal 5 submittal (Ex. C) a 8.5x11 color map titled: "City Goal 5 GIS Layer." PDF page 47. This is not an adopted Goal 5 map. The adopted maps are at PDF pages 42 and 45.

going to fit on the site. Something will have to give. What will that be? Who will exercise the discretion to make that decision? Will the City be able to simply deny development permits because the project as approved can't be done consistent with the new storm water standards?

TIA Requirement in EC 9.8650: The City suggests that the Type II TIA standards will apply to this proposal in the future. EC 9.8650 to EC 9.8680 requires study of traffic impacts of development applications in certain situations. If that study shows certain levels of impact, then the code anticipates implementing solutions in connection with approval of the project.

The purpose of Traffic Impact Analysis is stated in EC 9.8650, which says in part:

> "The purpose of Traffic Impact Analysis Review is to ensure that developments which will generate a significant amount of traffic, cause an increase in traffic that will contribute to traffic problems in the area, or result in levels of service of the roadway system in the vicinity of the development that do not meet adopted level of service standards provide the facilities necessary to accommodate the traffic impact of the proposed development."

The triggers for doing a Traffic Impact Analysis are stated in EC 9.8670. The most likely trigger that would apply to this development proposal appears in EC 9.8670(1), which says:

> "(1) The development will generate 100 or more vehicle trips during any peak hour as determined by using the most recent edition of the Institute of Transportation Engineer's Trip Generation. In developments involving a land division, the peak hour trips shall be calculated based on the likely development that will occur on all lots resulting from the land division."

The approval criteria for the results of a study are stated in EC 9.8680. The most relevant standard for this project is in EC 9.8680(1), which says:

> "(1) Traffic control devices and public or private improvements as necessary to achieve the purposes listed in this section will be implemented. These improvements may include, but are not limited to, street and intersection improvements, sidewalks, bike lanes, traffic control signs and signals, parking regulation, driveway location, and street lighting."

The TIA code standards above call for discretionary judgments about what is needed or desirable in terms of transportation improvements. See the standard in EC 9.8680(1) quoted above and compare it with the "Purpose" statements for TIAs in EC 9.8650.

In summary, the City should not be pressing for the right to apply the TIA standards in the future. These are the kinds of standards that are anathema to the Needed Housing Statute, aside from being off the table under the Goalposts Statute.

Dated: July 22, 2016.

Respectfully submitted,

Bill Kloos

Bill Kloos
Attorney for Applicant

Enclosure

Eugene Planning

APPEAL OF INITIAL HEARINGS OFFICIAL OR HISTORIC REVIEW BOARD DECISION

The appeal of an initial Hearings Official or Historic Review Board decision provides for a review of a quasi-judicial decision by a higher review authority specified in the Land Use Code. In general, the appeal procedures allow for a review of the original application, the Hearings Official or Historic Review Board decision, the appeal application, and any facts or testimony relating to issues and materials that were submitted before or during the initial quasi-judicial public hearing process. The Hearings Official or Historic Review Board decision may be affirmed, reversed, modified, or remanded by the Planning Commission.

Please check one of the following:

- ☐ Adjustment Review, Major
- ☒ Conditional Use Permit
- ☐ Historic Landmark Designation
- ☐ Planned Unit Development, Tentative Plan
- ☐ Willamette Greenway Permit
- ☐ Zone Change*

**This appeal form is not applicable for zone changes processed concurrently with a Metro Plan amendment, the adoption or amendment of a refinement plan, a Land Use Code amendment, or the application of the /ND Nodal Development overlay zone.*

City File Name: CATHEDRAL PARK CIR

City File Number: CU 02-4

Date of Hearings Official or Historic Review Board Decision: 7-31-016

Date Appeal Filed: 8-11-016

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☒ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how the Hearings Official or Historic Review Board failed to properly evaluate the application or make a decision consistent iwtht he original application. Please contact Planning staff at the Permit and Information center, 99 West 10th avenue, 541-682-5377, for further information on the appeal process.

☒ A filing fee must accompany all Hearing's Official and Historic Review Board appeals. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning staff at the Permit and Information Center to determine the required fee or check on the web at: www.eugeneplanning.org

Planning & Development
Planning Division
99 W. 10TH Avenue, Eugene, OR 97401
P 541.682.5377 * F 541.685.5572

Acknowledgment
I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT:

Name (print): CHARLES WIPER INC Phone: 541-393-1401

Company/Organization:

Address: 3900 S. WILLAMETTE ST

City/State/Zip: EUGENE OR 97405

Signature:

APPELLANT'S REPRESENTATIVE:

Name (print): BILL KLOOS

Company/Organization: LAW OFFICE BILL KLOOS PC

Address: 375 W. 4TH AVE #204

City/State/Zip: EUGENE E-mail (if applicable): OR 97401 BILLKLOOS@LANDUSEOREGON.COM

Phone: 541-343-8596 Fax: —o—

Signature:

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association:

Planning
Receipt

Planning & Development
Planning Division
99 West 10th Avenue
Eugene, OR 97401
(541) 682-5377

Date: 8/11/16

Received From: CHARLES WIPER

Address:

Method of Payment:
- ☐ Cash
- ☐ Check
- ☒ Visa/MC

Amount Received: $ 1190.00

Phone: ( )

Project: CU 02-4

Enter amount:

Annexation	$	Subdivision, Tentative	$
Appeal	$ 1190.00	Subdivision, Final	$
Conditional Use Permit	$	Traffic Impact Analysis	$
Legal Lot Verification	$	Vacations (all)	$
Lot Validation	$	Willamette Greenway Permit	$
Partition, Tentative	$	Zone Change	$
Partition, Final	$	Other	$
Property Line Adjustment	$	Fire Review Fee	$
PUD Tentative	$	**Subtotal**	$
PUD Final	$	***Administrative Fee (except appeals)***	$
Site Review	$	**TOTAL**	$ 1190.00

Staff Initials KEW

Updated: June 2015

DUPLICATE RECEIPT DUPLICATE RECEIPT

CITY OF EUGENE
BUILDING & PERMIT SERVICE
99 WEST 10TH AVE 682-5086

REG-RECEIPT:3-0005741 Aug 11 2016
CASHIER: DMB

Appeal of Planning App De	$1,190.00
TOTAL DUE:	$1,190.00

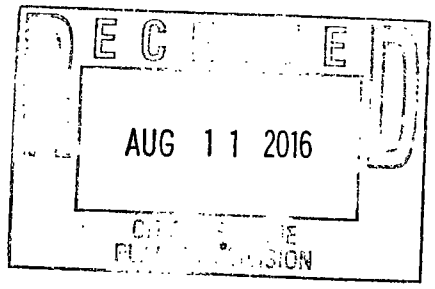
RECEIVED FROM:
CHARLES WIPER

Credit:	$1,190.00
Total tendered:	$1,190.00
Change due:	$.00

www.eugene-or.gov/bldgpermittracking

Please take our customer survey at:
www.surveymonkey.com/s/COEPermitSurvey

DUPLICATE RECEIPT DUPLICATE RECEIPT



To: Eugene Planning Commission
c/o Eugene Planning and Development
99 West 10th Ave.
Eugene, OR 97401

From: Marilyn Cohen
71 Westbrook Way
Eugene, OR 97405
Tel. 541-344-0796

Re: Cathedral Park (CU 02-4)
Opponents' Appeal to the Planning Commission of the Hearings Official's Approval

Date: August 11, 2016

Dear Commissioners:

The proposal in this case is for a 172 unit controlled income and rent housing development on the southern portion of Rest Haven Cemetery on Willamette Street near Brae Burn Drive. The application was originally submitted on April 8, 2002. The hearing on the application was held on June 29, 2016, and the Hearings Official granted approval on August 1, 2016.

I and a group of neighbors bordering the proposed development and affected by it are submitting this appeal in opposition to the Hearings Official's decision. A list of all the co-appellants, including myself, is attached to the Appeal cover sheet. I have indicated next to each name the person's right to appeal.

I submitted testimony, both orally and in writing, at the evidentiary hearing stage. I live opposite the southern boundary of the proposed development. My home is located next to Brae Burn Creek which is involved in the proposed development. I am submitting this appeal as an adversely affected person.

Thank you for your consideration of this appeal.

Respectfully submitted,

Marilyn Cohen

Marilyn Cohen

I. INTRODUCTION: THE CONFLICT BETWEEN THE CIR-CUP APPLICATION AND THE 1995 CUP AND THE 1998 CONDITIONAL USE AGREEMENT

This case involves a CIR-CUP application that was filed in 2002 to develop controlled income and rent housing on 15.8 acres of Rest Haven Cemetery. The 15.8 acres is part of the masterplan for the cemetery and is governed by a 1995 CUP and 1998 Conditional Use Agreement which restrict the use of the 15.8 acres to cemetery use. In addition, the 1995 CUP and the 1998 Agreement impose a 75 foot buffer zone in the 15.8 acres which would be violated by the proposed development.

When the application was filed, the city rejected it on the ground that the application conflicted with the 1995 CUP. The applicant appealed and LUBA remanded the case on the ground that the planning department could not reject the application without giving the applicant the right to argue whether the CIR-CUP application conflicted with the 1995 CUP, and that the hearings official, not the planning director, is the person to resolve the conflict between the application and the 1995 CUP. (Wiper v. City of Eugene, LUBA Nos. 2002-131 and 2002-132, March 3, 2003.

Subsequent to the remand the applicant, at the city's suggestion, filed an application to modify the 1995 CUP to excise the 15.8 acres from the footprint of the CUP, to allow uses in the 15.8 acres to access roads and utilities in other parts of the cemetery, and to allow the 15.8 acres to be developed with uses otherwise allowed in the R-1 zone, such as residential uses.

The hearings official denied all of the applicant's requests. On appeal, LUBA upheld the hearings official's findings. LUBA noted that "[the 1995 CUP applicant proposed, and the city conceptually approved, cemetery uses in Zone 6 [the 15.8 acres]. The conditions and uses approved under the 1995 CUP were predicated on an assumption that Zone 6 would be developed with cemetery uses". LUBA in Wiper v. City of Eugene, LUBA No. 2004-016 Final Opinion and Order, May 10, 2004 (slip opinion attached) p.8.

In sum, under the CUP and the Agreement, there can be no housing development or any non-cemetery uses on the site, and uses on the site cannot access roads and utilities in other areas of the cemetery governed by the CUP. The 1995 CUP and the 1998 Conditional Use Agreement as interpreted by the LUBA governed the use of the proposed site at the time the CIR-CUP application was filed and continue to govern the site.

As discussed below, the conflict between the CIR-CUP application on the one hand and the 1995 CUP and 1998 Conditional Use Agreement on the other is important because it affects the applicant's ability to meet the approval criteria in EC 9.724(2)(a).

II. CODE PROVISIONS GOVERNING THIS CASE

Eugene Code Section 9.386 (13) in effect at the time the application was filed provides that "[w]here an application is processed under section 9.724, the provisions of that section are exclusive".

Eugene Code Section 9.724(2) (a) and (b) provide:

"Criteria for hearings official approval. Applications for conditional use permits for controlled income and rent housing shall be processed and scheduled for public hearings in the same manner as other conditional use permit applications, except the following shall substitute for the required criteria listed in section 9.702:

"(a) Public facilities and services are available to the site. If the public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to need by reason of:

> "1. Prior commitment of public funds or planning by the appropriate agencies, or
>
> "2. A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or
>
> "3. Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development.

"(b) The proposed project is designed to:

> "1. Avoid unnecessary removal of attractive natural vegetation;
>
> "2. Provide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas; and
>
> "3. Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress".

The applicant has stated that if public facilities and services are not available, he will proceed under Section 9.724(2)(a)(2). Therefore, in this case, Section 9.724(2)(a) and subsection (a)(2) are the relevant sections setting forth approval criteria for facilities and services. They require that 1) public services and facilities are available to the site; and 2) if public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to need by reason of a commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies.

III. THE PUBLIC WORKS REFERRAL REPORT, JUNE 13, 2016

This appeal refers on several issues to the Public Works Referral Response submitted in regard to this CIR application by Donna Stark, Public Works Engineering on June 13, 2016. (A copy is attached). Public Works is the public agency with the expertise regarding facilities and services and the staff report should be considered expert testimony. Indeed, other than a traffic engineer's report on sight distances submitted by the applicant, there is no other expert testimony regarding this development in the record.

The summary at the beginning of Public Works Referral Response clearly states that the "staff does not find there is sufficient information to recommend approval of the Conditional Use Permit based on the following evaluation of the criteria specific to our area of expertise, per the Eugene code in effect at the time of application". Id. p.1. (Emphasis added). The Response then analyzed the wastewater service, streets and sidewalks, and stormwater services proposed for this development. The staff's specific findings are addressed in the body of this appeal.

And again at the end of its Response, Public Works reiterated that "there is insufficient information and evidence in the application materials to date, in order to find compliance with the applicable approval criteria". Id. p.4. No subsequent evidence has been provided by the applicant to counter Public Works findings.

The Public Works Referral Response was incorporated by reference into my Post Hearing Submittal p.2, and was included as Attachment A to that testimony. It was also referred to in arguments in that testimony and in my subsequent Response Testimony, dated July 15, 2016.

Although the Public Works Referral Response was in the record, and although Public Works has the expertise regarding public facilities and services, the Hearings Official made no reference to the Public Works Referral Response in his decision. He relied upon a statement in the Planning Division's staff report to make a blanket statement that public facilities are available to the site rather than referring to the underlying Public Works Referral Response to determine whether specific public services and facilities are currently available. Decision of the Hearings Official, CU 02-4, p.5. And he made no reference to the Public Works Referral Response in regard to the proposed private services and facilities.

IV. CODE PROVISION RELEVANT TO FILING THIS APPEAL:

EC 9.714 (dated September 4, 1996): Appeals Within ten days of the date that notice of the hearing's official's decision was mailed, it may be appealed to the planning commission by the owner, applicant, party, an adversely affected person, or a person entitled to notice under subsection 9.706(1) of this code. The appeal shall be made by filing a statement of issues on appeal and other information on a form prescribed by the city. The appeal shall be based on the record, shall state specifically how the hearings official failed to properly evaluate the proposed conditional use application or make a decision consistent with applicable criteria, and shall be limited to the issues raised at the evidentiary hearing that are set out in the filed statement of issues.

V. STATEMENT OF THE ISSUES:

Issue 1: Public wastewater services are not available to the entire project. Since EC 9.724(2)(a) requires that public services and facilities be available, this failure regarding wastewater services violates the code's approval criteria. The Commission should find that the Hearings Official erred in finding that public wastewater services are available to the proposed development, should reverse the Hearings Official's Decision, and should deny the application.

EC 9.724(2)(a) requires as a condition for approval that public services and facilities are available to the site. The Public Works Referral Response specifically addressed the availability of public wastewater service to the development and found that public wastewater service is not available to the entire proposed development. Public Works Referral Response, p.2.

The Response noted that "[t]he applicant proposes connecting a portion of the development to the public wastewater system located within a Public Utility Easement that crosses the southwest portion of the site". Id. p.2. (Emphasis added). The remainder of the development will need to discharge wastewater at Willamette Street. However, the Response noted that "[p]ublic wastewater service is not currently available in Willamette Street adjacent to the site". (Emphasis added). Thus, the application does not comply with the requirement of EC 9.724(2)(a) that public services are available.

The Public Works Referral Response also noted that "Willamette Street was resurfaced in 2011 and is subject to a street cut moratorium". Id. p.5. This moratorium therefore prevents the construction of an extension under the street to reach a manhole across Willamette Street at 40th Ave. to connect with the public wastewater service.

In addition, the applicant, in his Hearing Memorandum, acknowledged that "the sanitary discharge from the development needs to get to Willamette Street, somewhat north of the project boundary. Hence, it must traverse outside of Zone 6 [the 15.8 acres] and onto the future LDR property to the north". P.8.

However the applicant is prohibited under the 1995 CUP and the 1998 Conditional Use Agreement from accessing utilities on other parts of the cemetery. Thus, the applicant cannot make the commitment required by EC 9.724(2)(a)(2) to provide the necessary private wastewater connection. Evidence of such a commitment is necessary before the Hearings Official can make an affirmative finding that wastewater services are available.

The Hearings Official noted that he was faced with "substantial amounts of testimony" from a number of people regarding various public facilities and services, and dismissed all of the arguments on the ground that they related to the adequacy of the facilities and services, which is no longer a proper criterion. Decision of the Hearings Official, p.5. However, the Public Works Referral Response makes it clear that the issue regarding wastewater service goes to the availability, not the adequacy, of the service.

In sum, public wastewater service is not available to the entire project. Therefore the Commission should find that the applicant has failed to comply with the approval criteria of

EC 9.724(2)(a) that public services are available, reverse the Hearings Official's decision on this issue, and deny approval of the application.

(All of the issues discussed above regarding the availability of wastewater services to the development were raised in my Testimony submitted on June 28, 2016, pp 4-5; my Response Testimony dated July 15, 2016, pp.1 -2; and my Post Hearing Submittal submitted on July 8, 2016).

Issue 2: The 1995 CUP restricts the applicant's ability to develop the site and to access roads and utilities on other parts of the cemetery. Therefore, the applicant cannot make the requisite commitment under EC 9.724(2)(a)(2) to provide private facilities and services. The commitment under EC 9.724(2)(a)(2) is an approval criterion and evidence of the applicant's ability to make the commitment must be available before an approval can be granted. Accordingly, the Commission should hold that the Hearings Official erred in granting an approval conditioned upon the applicant obtaining a new CUP in the future, should reverse his decision, and deny the application.

EC 9.724(2)(a)(2) provides that if public services and facilities are not available, an affirmative finding may be made by the Hearings Official if there is evidence of a commitment by the applicant to provide private services and facilities.

The commitment to provide private services and facilities is an approval criterion in the event that public services and facilities are not available. The evidence of such a commitment needs to be presented to the Hearings Official in order for him to make an affirmative finding. The evidence of a commitment therefore must be presented before not after he makes his decision.

Under the 1995 CUP and the 1998 Conditional Use Agreement the applicant cannot commit to any housing development on the proposed site. He cannot commit to providing wastewater and stormwater services, water and electricity or even a street on the site. Accordingly, the applicant cannot provide evidence of the commitment required under EC 9.724(2)(a)(2) to provide private services and facilities on the site.

In addition, since the 1995 CUP and 1998 Agreement also prohibit uses on the site from accessing utilities and roads on other parts of the cemetery, the applicant cannot provide evidence of a commitment under EC 9.724(2)(a)(2) to provide private services and facilities that need to use those areas.

A comparison of the 1995 CUP final site plans and the CIR final site plan shows that the proposed development will use other parts of the cemetery in order to provide services and facilities. The site plans show that the proposed street and utility lines are situated on other parts of the cemetery. If wastewater service were available at 40th Ave. and Willamette St., the wastewater lines would also be situated on other parts of the cemetery. In addition, the 1995 CUP site plans show that the site has no direct access to Willamette Street. - the private street must cross other parts of the cemetery to reach Willamette. Given the restrictions of the 1995 CUP prohibiting uses on the site from accessing roads and utilities on other parts

of the cemetery, the applicant cannot provide evidence of the commitment required by EC 9.724(2)(a)(2) to provide needed services and facilities.

The Hearings Official acknowledged that "the opponents are correct that the proposed CIR housing would run afoul of the 1995 CUP...". Decision of the Hearings Official, p. 11. However, he held that "the application is specifically based on the premise (and a condition of approval) that the applicant will also obtain a new CUP regarding the cemetery use that allows Zone 6 to be removed from the cemetery CUP". Id. He concluded that "[a]ll of opponents' arguments regarding the 1995 CUP...do not provide a basis to deny the application". Id.

However, the commitment to provide private services and facilities is an approval criterion. The Hearings Official needed to have a commitment from the applicant before he made his decision and the applicant, given the restrictions in the 1995 CUP, simply could not make such a commitment. The Hearings Official therefore erred in approving the application.

The Hearings Official also noted that "[n]ormally, the applicant would obtain the new CUP for the cemetery that would remove Zone 6 before applying for the CIR housing, but because the new statute [regarding the processing of remands] requires action on the remanded CIR application within a certain time [180 days] the CIR CUP must proceed before obtaining a new CUP for the cemetery". Decision of the Hearings Official, p.3.

The Hearings Official ignored the fact that the applicant has had 12 years since LUBA denied modification of the 1995 CUP to file an application for a new CUP, but the applicant failed to do so. But whatever the reason, the applicant does not presently have a CUP that allows him to meet the approval criterion in EC 9.724(2)(a)(2) regarding a commitment and the application must be denied.

In sum, evidence of a commitment under EC 9.724(2)(a)(2) is an approval criterion and is necessary before the Hearings Official can make an affirmative finding. Since the 1995 CUP precludes such a commitment, the Commission should reverse the Hearings Official's decision. The Commission should hold that the Hearings Official erred in conditioning approval on the applicant's obtaining a new CUP, and should hold that the applicant's inability to make a commitment under EC 9.724(2)(a)(2) to provide private services requires denial of the CIR-CUP application.

In addition, conditioning approval on a future CUP is not appropriate. It is purely speculative at this point as to whether a future CUP, if any, will in fact excise the 15.8 acres from the cemetery masterplan, whether it will impose conditions that might prevent or adversely affect the development of services and facilities on the site, and whether it might prevent or adversely affect uses on the site from accessing or sharing services and utilities on other parts of the property.

It is instructive that the Hearings Official, in considering the applicability of the goal post rule to standards that came into effect after the application was filed, noted that "[u]ntil any future applications are submitted, any decision about what standards and criteria apply to those applications would be pure speculation". Id. p.12. Similarly, until a future CUP application to remove the 15.8 acres from the cemetery masterplan is submitted and decided,

it is pure speculation as to what the decision will be and whether the applicant will be able to provide private facilities and services on the site or access other parts of the cemetery.

(The issues discussed above were raised in my Testimony submitted on June 28, 2016, pp.1-3 and throughout the remainder of that testimony; and in my Response Testimony dated July 15, 2016, p. 2).

Issue 3. There is insufficient evidence in the record regarding the proposed private stormwater services and the proposed private street in violation of the requirements of EC 9.724(2)(a)(2). The Commission should therefore hold that the Hearings Official erred in finding that there was sufficient evidence regarding the proposed private stormwater services and the proposed private street, should reverse the decision and should deny the application.

As noted above, Public Works summarized its findings at the very beginning of its Referral Response by stating that "staff does not find there is sufficient information to recommend approval of the Conditional Use Permit based on the following evaluation of the criteria specific to our area of expertise, per the Eugene code in effect at the time of application". Public Works Referral Response, p.1. The staff then evaluated the wastewater service (discussed above), streets and sidewalks, and stormwater service.

At the end of the Public Works Referral Response, the staff repeated that "there is insufficient information and evidence in the application materials to date, in order to find compliance with the applicable approval criteria". Id p.4. No subsequent evidence was provided by the applicant to counter Public Works concerns.

Among other findings, Public Works specifically concluded that there is insufficient information to determine that two of the proposed private facilities and services meet the code criterion. Public Works found that 1) the applicant has not demonstrated that the proposed dwelling units will be served by a storm drainage system. The Public Works Response specifically noted that "staff does not concur that this criterion has been met...". Id p.3; and 2) there is insufficient information to determine that the private street, Cathedral Way, which will run through the development can feasibly be constructed to meet the local street standards in effect at the time of the application. (Id. pp 2-3).

(These issues were raised in my Post Hearing Submittal submitted June 8, 2016, p.2 where I incorporated the Public Works Referral Response into my testimony by reference. The issue of the street was also raised in my Testimony submitted June 28, 2016, p.6).

The Storm Drainage System:

The Public Works Referral Response notes that a private storm drainage system is shown to provide drainage for the private street and paved surfaces, but the applicant has not demonstrated that the proposed dwelling units will be served by a storm drainage system. Public Works staff does not concur that this criterion has been met and recommends that the plans be revised to demonstrate how the structures are served with [a] storm drainage

system that provides an acceptable destination for stormwater runoff". Id. p.3. (Emphasis added). The applicant has not revised his plans to address this issue.

The Hearings Official erred in failing to address this issue as an approval issue under EC 9.724(2)(a)(2). The Commission should reverse the approval on the ground that the applicant failed to comply with this approval criterion and deny the application.

The Private Street – Cathedral Way

The Public works Referral Response noted that:

> Based on ITE Category 220/Apartments, the development is expected to generate over 1100 daily trips on average. With an estimated Average Daily Trips greater than 750, the private street would be categorized as a Medium Volume local street. The applicant has not provided sufficient information for Public Works staff to evaluate whether the proposed private street would meet the local street standards as described in the Eugene Arterial & Collector Street Plan dated November, 1999.... As noted above, the proposed alignment does not appear to meet the maximum grade requirements (15% with up to 200-foot lengths of grades up to 20%, but no intersections or driveway access in areas with grades above 15%). As depicted on the plans, the proposed street also lacks the required sidewalk of at least 3 feet in width along one side and meeting ADA standards. The materials also lack any information about sight distance requirements or traffic controls that might be needed at the proposed intersections. At a minimum, the applicant would need to submit further evidence that the proposed private street can feasibly be constructed to meet the local street standards". Id. p.3. (Emphasis added).

Due to concerns about safety of egress from the proposed street on to Willamette St., the applicant did have a traffic engineer measure the sight distances from the proposed street, and the sight distances were met. Technical Memorandum of Dan Haga, dated July 6, 2016, p. 2. However, the applicant has not submitted any other information to address the Public Works findings.

The Hearings Official did not address this issue under EC 9.724(2)(a)(2), but did address it later in his decision in regard to the ingress and egress requirements of EC 9.724(2)(b)(3). In that discussion, he agreed with a staff report statement "that Cathedral Way may be too steep in certain places, but that such problems can be resolved through conditions of approval". Decision of the Hearings Official, p. 10. He also stated that the insufficiency of evidence regarding compliance with the 1999 road provisions could also be resolved through conditions of approval. Id.

However, under EC 9.724(2)(a)(2) the Hearings Official must base an affirmative finding upon evidence that there is a commitment to provide private services and facilities, in this instance a street, acceptable to the appropriate public agencies. The Hearings Official's decision ignored the Public Works finding that the applicant's information and evidence on the street is insufficient to allow an evaluation and to demonstrate that the proposed street is feasible.

Accordingly, the Commission should hold that the applicant has failed to provide sufficient evidence to meet the requirements of EC 9.724(2)(a) regarding the street, reverse the Hearings Official's decision in this regard, and deny the application.

In addition to the Public Works concerns about insufficient evidence, there are two additional issues regarding the proposed street which involve the applicant's inability to commit to providing a private street. First, as discussed above, the final site plan shows that the proposed road is outside of Zone 6, i.e. the 15.8 acres. In addition, a comparison of the 1995 CUP site plans and the CIR site plan shows that the 15.8 site itself has no access to Willamette Street. The project must therefore use other parts of the cemetery for its street access. However, use of other parts of the cemetery is prohibited under the 1995 CUP. Therefore, the applicant cannot meet the approval criterion in EC 9.724.(2)(a)(2) and make a commitment to provide a private street.

Second, the Technical Memorandum cited above, which was submitted as part of the record by the applicant, raised another issue regarding the street. The memorandum stated that Eugene Code 7.408 allows only one driveway access per frontage per development site. Rest Haven cemetery already has an existing driveway approach onto Willamette St. Since the proposed development site, i.e. the 15.8 acres, is currently part of the masterplan of the cemetery under the 1995 CUP, the applicant cannot make a commitment under EC 9.724(2)(a)(2) that a driveway, i.e. Cathedral Way, can connect to Willamette Street. (The Memorandum raising this issue was submitted by the applicant on June 22, 2016 as part of his final rebuttal and there was no opportunity for the opponents to address this issue).

In light of the applicant's inability under the 1995 CUP to commit to providing a street, the applicant cannot make the requisite commitment under EC 9.724(2)(a)(2) and the application should be denied.

Subissue regarding the street: The applicant's failure to meet the applicable private street standards and the general lack of evidence to demonstrate the function and safety of circulation, ingress and egress violate the approval requirement of EC 9.724(2)(b)(3). Accordingly, the Commission should reverse the Hearings Official's decision and deny the application.

The Public Works Referral Response stated "For the reasons described above, with respect to not meeting applicable private street standards, and the general lack of information and evidence to demonstrate the function and safety of circulation, ingress and egress for residents using the proposed street, Public Works staff concludes that this criterion [EC 9.724(2)(b)(3)] is not met. The proposal also lacks information to demonstrate compliance with applicable parking area standards from EC 9.584 and 9.589". P. 4.

The Hearings Official, as noted above, addressed this issue by stating that conditions of approval can satisfy these concerns. However, at a minimum, the applicant should be required to show that the proposed street is feasible. The issue of the street exceeding maximum grade was raised at the hearing, and the applicant's representative had no solution to offer as to how the street could meet the acceptable grade. The applicant had the Public Works Referral Response prior to the hearing and knew of the problem, but had not been able to solve it.

In light of the lack of evidence regarding the feasibility of ingress and egress under EC 9.724(2)(b)(3), the Commission should reverse the Hearings Official's decision on this issue and deny the application.

Issue 4: The piping of Brae Burn Creek and the capture, piping and pumping of surface and stormwater to irrigate other parts of the cemetery unnecessarily removes attractive natural vegetation in violation of EC 9.724(b)(1). The Commission should hold that the Hearings Official erred in finding that piping the creek is necessary for wastewater and stormwater management, and should hold that the piping of the creek will unnecessarily remove attractive natural vegetation in violation of EC 9.724(2)(b)(1).

EC 9.724(2)(b)(1) requires that the proposed project be designed to "Avoid unnecessary removal of attractive vegetation". (Emphasis added). The applicant has included plans in the CIR application to pipe approximately 340 feet of Brae Burn Creek that cross the southwest corner of his property. His plan is to pipe the creek, capture surface and stormwater and pump the water to a future reservoir to irrigate other parts of the cemetery. Applicant's Hearing Memorandum, p. 3. Since the piping will be part of an irrigation system for other parts of the cemetery, it is not necessary for the proposed housing development and will unnecessarily remove attractive natural vegetation in violation of EC 9.724(2)(b)(1).

The Hearings Officer, however, found that the piping of the creek is necessary to get sanitary lines under the creek to reach City facilities south of the property, that it is necessary to remove vegetation to get storm water to the creek, and that piping the creek is part of the CIR housing development. Decision of the Hearings Official, p. 8. However, the Hearings Official's findings on this issue are in error.

First, the Hearings Official made a factual error in holding that "[t]he creek is piped on both sides of the property ... [and that] [t]he application seeks to pipe the rest of the creek...". Decision of the Hearings Official, p.3. The creek, in fact, is not piped on both sides of the property. As my Post Hearing Submittal, p.3 states, "[t]he creek is open its entire length, except where it goes under streets". Oral testimony at the hearing by David Berg and Tamara Horodysky also provided evidence that the creek is not piped next to the applicant's property and that the only piping is culverts under Brae Burn Drive.

The clearest evidence that the creek is not piped on either side of the applicant's property is contained in the applicant's final site plan which shows that the applicant's property does not abut Brae Burn Drive where the culverts are contained.

Second, there is no evidence that the piping of the creek across the entire southwest corner of the property , a distance of approximately 340 feet, is necessary in order to place a sanitary line under the creek. The applicant submitted no expert testimony on the piping issue and there is nothing in the applicant's submissions explaining that such piping is necessary.

The Public Works Response on the wastewater service makes it clear that such piping is not necessary. Public Works noted in regard to wastewater that "the connection to the public wastewater system at this location would appear to involve a crossing of North Braewood

Creek". Id. p.2. (Emphasis added). There was no mention by Public Works that piping the creek was involved, let alone 340 feet of pipe.

Third, there is no evidence that piping 340 feet of the creek is necessary for stormwater management for the housing development. The applicant has not provided any expert evidence that piping the creek is necessary to handle the surface and stormwater runoff from the housing development. His only stated intent is to pipe the creek so he can pump water from his property and apparently from the creek to a reservoir to irrigate other parts of the cemetery.

The staff report indicated that there are other ways of dealing with stormwater runoff that would not involve piping the creek. In discussing the possibility of a future denial of the proposed piping under the Water Resources Overlay, the staff noted "there would be other means of providing stormwater infrastructure necessary for the CIR housing without fully enclosing the stream corridor in a pipe". Staff Report of Gabe Flock, Senior Planner, July 8, 2016, p. 6.

In addition, the Public Works Referral Response states that the proposed piping of the creek to the proposed pond should not be addressed through the CIR approval process. Public Works, at the end of its Response in a section entitled Informational Items, notes that "[t]he site plan shows piping an on-site creek, and diverting the water to a proposed pond. This proposal is not addressed through the CIR/CUP criteria and is not evaluated or approved through this process". Public Works Referral Response, P. 5. (Emphasis added).

In sum, the piping of the creek is not necessary to get sanitary lines under the creek and is not necessary for management of the stormwater services for the housing development.

Since the piping will be installed in order to pump water to irrigate other parts of the cemetery, and is not necessary for the housing development, piping the 340 feet of the creek that go across the applicant's property will unnecessarily remove attractive natural vegetation alongside the creek as well as downstream in violation of EC 9.724(2)(b)(1).

The trail alongside the portion of the creek where the piping would be installed is part of a longer trail system that runs beside the creek. As the testimony of Ingrid Wendt shows, wildflowers bloom in abundance in the springtime on the banks of the creek. A large number of trees grow alongside the creek throughout the year.

The construction of the piping will remove attractive natural vegetation. The pipe itself, in the area where it is located, will also deprive flowers and trees of water, resulting in the removal of more attractive vegetation.

The pumping of water from the creek once the reservoir is completed will diminish the amount of downstream flow causing the loss of additional vegetation. And in the interim before the reservoir is completed, there will be an increase in the volume and velocity of the water caused by channeling the water into the pipe. This additional volume of water will also adversely affect wildflowers and trees causing their demise.

The Memorandum on Applicable CIR/CUP Standards, submitted by of Dan Terrell on behalf of the applicant, dated May 20, 2016, agrees that when an installation or development is not related to the housing development, vegetation cannot be removed. He states that "Whereas EC 9.724(2) has been interpreted that development must take precedence over vegetation is areas where the CIR housing project is to be constructed and the project does not have to be designed to preserve particular tree or vegetation areas, in areas not to be developed the reverse is the case". P. 5.

In addition, the Memorandum submitted by Gabe Flock, Senior Planner on July 8, 2016, states that "The proposal to pipe the stream for providing a supply of irrigation water underscores concerns already raised in the staff report, about the potential for unnecessary vegetation removal under the approval criteria at EC 9.724(2)(b)(1). To the extent that the proposed piping of the stream corridor and the related construction impacts would involve vegetation removal for purposes other than what is necessary for the proposed CIR housing, staff believes the impacts would be in violation of the standard". P. 5.

In light of the above discussion, the Commission should hold that the piping of the creek will unnecessarily remove attractive natural vegetation in violation of EC 9.724(2)(b)(1) and reverse the Hearings Official's decision on this issue.

Issue 5: The application is too vague for approval. The Commission should hold that the Hearings Official erred in approving the application given the overall vagueness and uncertainties of the application and deny the application.

The applicant's attorney stated at the hearing that he advised the applicant, as he had advised all his clients at the time, to file this CIR application to create a "holding place" in order to avoid the more stringent requirements of new laws. Other than filing a subsequent application in 2003 to modify the 1995 CUP, which was denied, the applicant took no further action on the case until May 2016 when a change in the law again required him to act in order not to lose his "holding place".

The applicant's Supporting Narrative and First Supplemental Supporting Narrative are extremely vague focusing mostly on the density of the project, and his subsequent memoranda do not provide detailed evidence. The applicant has provided no engineering analysis (other than the sight distance report filed on July 22, 2016) to support his application. He has provided no evidence of a financial commitment to fund the project, and has not obtained a non-profit or other developer to build the project.

The applicant, in his Hearing Memorandum, noted that a specific housing developer has not been selected: by definition, therefore, the exact specifications of the housing that will be funded are not known yet. ... [and] [t]he final, precise footprint of the improvements ...can't be known at this moment" P.7..

The applicant's Suggested Condition of Approval COA 3, which was incorporated in the final Approval Conditions, also reveals how far the applicant is from having a fixed plan. COA 3 stated that "[e]xcept for the limitation of not more than 172 total units and the development impact area described in these conditions of approval, the site plan is conceptual in nature, is not binding, and the actual development may differ". Applicant's

Suggested Conditions of Approval, COA 3, June 29, 2016, adopted by the Hearings Official as Condition 2.

The applicant also requested and obtained the authority to determine, in the future, all matters pertaining to development. COA 2 of the Hearings Official's Conditions of Approval, which was requested by the applicant, states that "[t}he timing, size, mix of units, the number, location and development to be included in each phase and all other matters pertaining to development of the approved CIR CUP are to be determined by the applicant".

The vagueness of the application and the authority granted to the applicant in the future deprives the neighbors of a meaningful opportunity to challenge the development at the hearing level, creating a procedural violation.

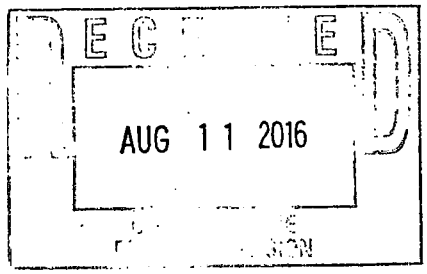
In light of the above, the Commission should hold that the Hearings Official erred in granting the approval.

(These points were raised in my Post Hearing Submittal, pp2-3)

Respectfully submitted,

Marilyn Cohen

Marilyn Cohen and co-appellants



DECISION OF THE HEARINGS OFFICIAL
FOR THE CITY OF EUGENE, OREGON

CONDITIONAL USE PERMIT REQUEST

Application File Name (Number):

Cathedral Park (CU 02-4).

Application Summary:

Conditional use permit application to construct 172 units of controlled income and rent housing.

Property Owner/ Applicant:

Charles Wiper.

Lead City Staff:

Gabe Flock, Senior Planner.

Subject Property/Zoning/Location:

Southerly portion of undeveloped portion of Rest Haven Memorial Park Cemetery, west of Willamette Street; north of Braeburn Drive. Assessor's Map 18-03-18-00 Tax Lot 300. The current zoning is R-1/WR – Low-Density Residential with a Water Resources Conservation Overlay. When the application was filed, the zoning was RA – Suburban Residential and did not include the Water Resources Conservation Overlay.

Relevant Dates:

The application was originally submitted on April 8, 2002. The application was eventually deemed incomplete on August 15, 2002 and rejected by the City on September 13, 2002. The Land Use Board of Appeals remanded the City's decision on March 3, 2003. The applicant requested that the remand application be processed on May 11, 2016. A public hearing was held on June 29, 2016.

Summary of the Public Hearing

At the public hearing, senior planner Gabe Flock discussed the staff report and explained that there was not enough information to demonstrate compliance with all of the approval criteria. City attorney Anne Davies discussed the applicable ordinances. The applicant's representatives explained the nature of the application and argued in favor of its approval. A number of neighbors and other opponents testified in opposition to the application. At the conclusion of the public

hearing, the record was left open nine days for the submission of new evidence, one additional week for responses to the new evidence, and one more additional week for the applicant's final legal argument.

DOCUMENTS CONSIDERED BY THE HEARINGS OFFICIAL

I have considered all of the documents in the planning file for the proposed conditional use permit (CU 02-4), including all the materials submitted during the open record period, as well as the testimony provided at the public hearing.

FACTS

This case involves an unusual situation. The subject property, Rest Haven Cemetery, has been involved in numerous land use applications, disputes, and appeals to various bodies. The cemetery is a 72-acre parcel surrounded by residential uses. The present case begins with a conditional use permit (CUP) approval obtained in 1995 that authorized the cemetery use in two phases. The first phase authorized cemetery uses on the most of the property except the southern portion of the property. The second phase authorized cemetery uses on the southernmost 15.8 acres of the property known as Zone 6 (the area in dispute in the present case) subject to Condition of Approval 17 which required a 75-foot buffer along the southern property line. The CUP did not approve a specific development plan for the second phase, but instead required a later application and approval in order to develop that portion of the property.

In 2002, the owner sought to develop Zone 6 as controlled income and rent (CIR) housing. The CIR application was filed as a CUP under the applicable Eugene Code (EC) provisions at the time. The City refused to process the 2002 CIR housing application because the City believed the CIR application was in conflict with the 1995 CUP. The owner appealed the City's refusal to process the application to the Land Use Board of Appeal (LUBA), who remanded the decision instructing the City to process the application and make a decision. *Wiper v. City of Eugene*, 44 Or LUBA 127 (2003). Subsequent to the remand, the owner filed a new application to allow the CIR housing or to modify the 1995 CUP to remove Zone 6 from the cemetery CUP. This application was not a proceeding on remand on the CIR housing application that had been remanded by LUBA. Instead it was a new application regarding the 1995 CUP. The City denied this application because allowing CIR housing in Zone 6 could not be accomplished with a CUP modification. The owner appealed that denial to LUBA, and LUBA affirmed the City's denial. *Wiper v. City of Eugene*, 47

Or LUBA 21 (2004). Thus, the existing state of circumstances was an approved 1995 CUP and a remanded 2002 CIR housing application.

The remanded CIR housing application sat unaddressed for many years. A recent change in state law requires such lingering applications to be processed or abandoned. The applicant therefore asked that the 2002 CIR housing application be processed. The applicant realizes that CIR housing cannot be approved on Zone 6 unless Zone 6 is removed from the 1995 cemetery CUP. In order to remove Zone 6 from the 1995 CUP, the applicant must obtain approval of a new CUP for the cemetery, and the applicant has apparently begun the process of seeking a new CUP. Normally, the applicant would obtain the new CUP for the cemetery that would remove Zone 6 before applying for the CIR housing, but because the new statute requires action on the remanded CIR application within a certain time the CIR CUP must proceed before obtaining a new CUP for the cemetery. The applicant realizes that approval of the CIR CUP would require a condition of approval requiring approval of a new CUP for the cemetery removing Zone 6 from the 1995 CUP.

The proposed CIR CUP application request is for approval of 172 units consisting of 12 studio units, 36 one-bedroom flats, 92 two-bedroom flats, 20 two-bedroom townhouses, 12 three-bedroom townhouses, and one community building. The applicant does not intend to develop the CIR housing but rather to work with an experienced developer of affordable housing to complete the project. Because the applicant is not planning on developing the project independently, some of the details of the proposed development are not as specific as if the application were being submitted by the developer. The proposed development would construct Cathedral Way running in a roughly U-shape from Willamette Street on the east, along the southern portion of Zone 6, and connecting to West 40th Avenue on the west, which would then connect to Braeburn Drive further to the west. The residences would be constructed along Cathedral Way. Although some of the existing trees would remain, many of the trees in the 75-foot buffer would be removed. Cathedral Way would run along the southern boundary of the property but would still have some buffer. When Cathedral Way turns north and runs along the western boundary, however, the developed area would be adjacent to the property line. A creek crosses the property in the southwest portion of the property. The creek is piped on both sides of the property but is not piped on the property. The application seeks to pipe the rest of the creek, and to use collected surface water and storm water for irrigation purposes.

ANALYSIS

This application was originally filed in 2002. Under the "goal post" rule, the application must be decided based upon the approval criteria that were applicable when the application was first submitted.[1] In 2002, CIR housing was a conditional use in the RA zone. EC 9.724 (2002) provided the applicable provisions for CIR housing.[2] EC 9.724(1) provides:

> "Allowance of increased density. Subject to the standards contained in this section, the hearings official may increase density as follows:
>
> "(a) In RA and R-1 zoning districts, up to 75 percent of the allowable density for an R-2 development * * *."

As the staff report explains, the allowable density for R-2 development was 20 units per acre, so the proposed CIR CUP may have up to 15 units per acre. The staff report further explains that the proposed CIR CUP would have a density of either 11 or 11.8 units per acre depending on whether the Cathedral Way is included in the calculation. Either way, the proposed density easily is less than the allowable 15 units per acre. EC 9.724(1) is satisfied.

EC 9.724(2) provides:

> "Criteria for hearings official approval. Applications for conditional use permits for controlled income and rent housing shall be processed and scheduled for public hearings in the same manner as other conditional permit applications, except the following shall substitute for the required criteria listed in 9.702:
>
> "(a) Public facilities and services are available to the site. If the public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to the need by reason of:
>
> "1. Prior commitment of public funds or planning by the appropriate agencies, or
>
> "2. A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or

[1] ORS 227.178(3)(a) provides: "If the application was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

[2] Unless otherwise noted, all EC references are to the 2002 version that was applicable when the applicable was filed.

"3. Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development."

The staff report states that public facilities are available to the site. Opponents provided substantial amounts of testimony arguing that various public facilities and services are inadequate to serve the increase in population that would occur with approval of the CIR housing. In particular, opponents argue sanitary sewer, storm water, schools, and roads are not adequate to serve the proposed development. Opponents argue that traffic is already congested and dangerous on both sides of the property. According to opponents, the proposed CIR housing would only exacerbate an already serious problem. Opponents also argue that storm water runoff already causes problems for properties near the southwestern corner of the property. According to opponents, the creek in the southwestern corner already floods and the increased impervious surfaces would make the problem worse. Opponents also argue that schools do not have capacity for the additional students that would arrive with the proposed development.

If EC 9.724(2)(a) required that all public facilities and services were adequate to serve the proposed use, I might well agree with opponents that the approval criterion was not satisfied. EC 9.724(2)(a), however, does not require that public facilities and services are adequate – merely that they are "available." As the applicant explains in a lengthy history of the CIR ordinances, an earlier version of EC 9.724(2)(a) required that "[p]ublic and private facilities are *adequate* to meet anticipated demand." (Emphasis added.) After the adequacy requirement resulted in problems for obtaining approvals for CIR housing, the City amended the EC to remove the adequacy requirement so that CIR housing applications could be approved as long as public facilities and services were available to the site rather than requiring that they be adequate. As the applicant further explains, the Planning Commission applied the version of EC 9.724(2)(a) at issue in the present case in the Woodleaf Village case (CU 95-7) and in response to arguments that public facilities and services were not adequate found that the EC amendments removed the adequacy requirement. The Planning Commission found that public facilities and services were available to the property and imposed conditions of approval to improve some of the public facilities and services that needed improvement due to the project. As the Woodleaf Village case makes clear, the question under EC 9.724(2)(a) is whether public services are available not whether they are adequate. In the present case, even though some of the public facilities and services may be

currently inadequate they are available.[3] Opponents' arguments concerning the inadequacy of public facilities and services do not provide a basis for denying the application.

Many of the opponents' arguments regarding traffic, noise, disturbances, views, and storm water are based on the alleged adverse impacts the proposed CIR housing development would have on the opponents' use and enjoyment of their properties. While those would be valid and relevant arguments under a standard CUP application, such adverse impacts are not a consideration under EC 9.724(2), except as discussed later under EC 9.724(2).[4] Therefore, except as discussed later, opponents' arguments regarding adverse off-site impacts do not provide a basis for denying the application. EC 9.724(2)(a) is satisfied.

EC 9.724(2)(b) provides:

> "The proposed project is designed to:
>
> "1. Avoid unnecessary removal of attractive vegetation;
>
> "2. Provide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas; and
>
> "3. Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress."

EC 9.724(2)(b)(1) requires that the proposed project is designed to "[a]void unnecessary removal of attractive vegetation." The CIR housing application proposes to remove substantial amounts of vegetation. All of the vegetation contained within the U-shaped site plan is proposed to be removed to construct the proposed road, buildings, and facilities. Opponents argue that the proposal violates EC 9.724(2)(b)(1) because so much vegetation is proposed to be removed. According to opponents, too much vegetation would be removed, in particular the large trees that currently provide a buffer on the southern portion of the property. The staff report states that there

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[3] The applicant and staff have proposed conditions of approval to improve public facilities and services.

[4] Under current EC 9.8090(2) the conditional use approval criteria provide: "The location, size, design, and operating characteristics of the proposal are reasonably compatible with and have minimal impact on the livability or appropriate development of surrounding property, as they relate to the following factors: (a) The proposed building(s) mass and scale are physically suitable for the type of density of use being proposed. (b) The proposed structures, parking lots, outdoor use areas or other site improvements which could cause substantial off-site impacts such as noise, glare and odors are oriented away from nearby residential uses and/or are adequately mitigated through other design techniques, such as screening and increased setbacks. (c) If the proposal involves a residential use, the project is designed, sited and/or adequately buffered to minimize off-site impacts which could adversely affect the future residents of the subject property."

is not enough information to determine whether there is unnecessary removal of attractive vegetation:

> "Because the full extent of vegetation removal remains unclear, and the applicant has not justified the necessity of the proposed alignments, the necessity for vegetation removal in those areas is not clearly demonstrated. Without more precise information regarding the location of existing vegetation, and the area of necessary construction impact to accommodate the proposed facilities (serving the proposed CIR housing), an evaluation of the extent of necessary vegetation removal is not possible at this time.
>
> "Staff acknowledges that something less than a full tree inventory (as required for Woodleaf Village) would be adequate, subject to consideration and approval by the Hearings Official. For example, the applicant could still provide a more detailed plan showing the full extent of grading and site improvements, a more detailed look at the trees adjacent to the limits of proposed impact, along with an arborist report recommending proposed protection measures.
>
> "Additionally, conditions of approval could be imposed to ensure that a tree preservation plan is put in place to ensure protection of the trees indicated to remain over the long-term, and pending any additional evidence provided by the applicant, staff would request the opportunity to evaluate and recommend any appropriate conditions of approval in response to what is provided." Staff Report 11.

The applicant provided clarification for which portions of the property would have vegetation removed. While the exact specifications of the proposed development are not finalized, the applicant has provided a site plan that shows which areas would have vegetation removed. The applicant again explains how the Planning Commission interpreted this provision in the Woodleaf Village case. The Planning Commission found:

> "Given the intent and direction of the council to facilitate the construction of controlled income rent housing, and the fact that this term is found in the criteria for approval of an increase in density, leads to a conclusion that an element of necessary destruction of vegetation is that which must be lost to accommodate the increased density. The maximum allowable density under the ordinance must be presumed and vegetation lost to accommodate that maximum density is necessarily lost. * * *
>
> "It is a fact of development, however, that the site must accommodate the housing units, common areas and dedicated streets. If a site has vegetation throughout, as this one does, it will be necessary to remove a substantial portion of that vegetation in order to accommodate a controlled income and rent housing project."

As the applicant demonstrates, under EC 9.724(2)(b)(1) if CIR housing construction is proposed for a particular area then the vegetation gets removed. In areas that are not proposed for development, the vegetation is to be preserved. The CIR housing proposal only proposes to remove vegetation in the areas proposed for development. The application proposes to retain the remaining vegetation. The applicant has suggested conditions of approval that further protect remaining vegetation. While it is true that a large amount of vegetation is proposed to be removed, under the reasoning in Woodleaf Village it is not unnecessary removal. Furthermore, the applicant is not even proposing to develop to the maximum allowable density.

As discussed earlier, the applicant proposes to pipe the currently exposed creek in the southwestern portion of the property. Opponents argue, among other things, that in order to pipe the creek that additional vegetation would have to be removed. According to opponents, because the applicant does not have to pipe the creek (and they also argue piping the creek is prohibited) removing vegetation to pipe the creek is unnecessary. The applicant explains that piping the creek is necessary to get sanitary lines under the creek to reach City facilities south of the property and that it is necessary to remove vegetation to get storm water to the creek. Opponents have not pointed to anything in the 2002 EC that would prohibit piping the creek. I agree with the applicant that piping the creek is part of the CIR housing development and therefore removing vegetation for that development is not unnecessary. EC 9.724(2)(b)(1) is satisfied.

EC 9.724(2)(b)(2) requires that the proposed project is designed to "[p]rovide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas." Currently there is at least a 75-foot buffer in Zone 6 for residences to the south and southwest of the property. The proposed CIR housing would eliminate much but not all of the buffer on the southern boundary and would eliminate all of the buffer on the western boundary where Cathedral Way would connect to West 40th Avenue. Opponents argue that eliminating so much of the 75-foot buffer would not provide enough of a setback along the southern and western boundaries. According to opponents, adjoining residences need to be screened from the proposed use to protect their privacy. The staff report found that it was not clear that EC 9.724(2)(b)(2) is satisfied.

> "Based on the applicant's June 9, 2016 site plans, trees and vegetation generally provide adequate screening along the southern and southwestern property lines, assuming preservation of such areas is conditioned. However, along the western property line (just south of the proposed connection of the private street to W.

> 40th Avenue) high-impact/activity areas including parking areas and trash enclosures are shown located right on or adjacent to the property line. No trees or vegetation is proposed to be retained or preserved in these areas, nor is any screening shown on the site plans. As apparent on the aerial photo, this area backs up to outdoor living areas of the adjacent residential uses. While staff believes that residential development is not necessarily or inherently incompatible with other adjacent, residential uses, the applicant's plans with regard to setbacks, fencing and screening are not entirely clear under this standards in terms of ensuring privacy to adjacent outdoor areas. It may be that with additional information, clarification, and perhaps refinements to the proposed site plans that the applicant could demonstrate compliance under this standard." Staff Report 12.

Although the exact details of the CIR housing would not be provided until a CIR developer is brought in, the proposed site plan shows the areas where the housing, roads, parking lots, and public facilities would be located. Even though the precise details of development are not known, the proposed site plan shows where the development would be located in relation to adjoining residences. EC 9.724(2)(b)(2) concerns ensuring "privacy to adjacent outdoor living areas." The adjacent outdoor living areas at issue are the back yards of residences adjoining the subject property to the south and west. I agree with the staff report that the proposed CIR housing has sufficient setbacks and screening from the residences to the south and southwest. In the south and southwest portions of the proposed site plan the proposed CIR housing is not developed up to the property line. There are open spaces and existing trees that would be retained that provide adequate screening to adjoining backyards.

The back yards to the west present a closer question. The proposed site plan shows the CIR development. There are residences, parking areas, and trash receptacles very close to the west property line on the site plan. If the approval criterion required that there be adequate setbacks and screening to ensure the privacy of adjacent outdoor uses, I would likely agree with opponents that the application does not satisfy the approval criterion. EC 9.724(2)(b)(2), however, only requires that the privacy of adjacent outdoor living area be ensured when "possible and practical." The applicant explains that the Planning Commission determined what EC 9.724(2)(b)(2) means in the Woodleaf Village case.

> "[EC 9.724(2)(b)(2) does] not promise much in the way of absolute protection from impacts of an abutting development of a controlled income and rent housing project. In short, the criterion requires the developer to 'do the best you can under the circumstances.' No absolute level of effectiveness of setback or

screening reducing impacts on adjacent property is required or assumed by the criterion."

Although the proposed CIR housing development is adjacent to the residences adjoining the property to the west, the applicant has done the best it can under the circumstances. Given that Cathedral Way connects to West 40th Avenue, the proposed development needs to be closer to those residences. Proposed conditions of approval require a sight obscuring fence, wall, or vegetation along the western property line to provide screening. While total privacy of adjacent outdoor living areas would not be achieved, the application ensures such privacy as much as is possible or practical under the circumstances. EC 9.724(2)(b)(2) is satisfied.

EC 9.724(2)(B)(3) requires that the proposed project is designed to "[p]rovide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress." Opponents argue that the application does not meet this approval criterion, in particular ingress and egress from the property. The staff report explains how the application satisfies the safety requirements for these features. The staff report focuses on the safety of such features on the subject property and ingress and egress from the property. Opponents' arguments include concerns about dangerous conditions on the roads adjoining the property. I agree with the staff report that the application satisfies the safety requirements on the subject property. The staff report notes that Cathedral Way may be too steep in certain places, but that such problems can be resolved through conditions of approval. Proposed conditions of approval require road design to comply with the 1999 road standards that were in effect at the time the application was submitted. With conditions of approval, EC 9.724(2)(b)(3) is satisfied.

EC 9.724(2)(c) provides:

"The increase in density shall not be permitted in areas that are unavailable for controlled income and rent (CIR) housing with increased density. Areas that are unavailable for increased density are shown on Figure 33 as shaded areas. Those areas not shaded on Figure 33 are available for CIR housing with increased density."

As the staff report explains, the subject property is not within any of the shaded areas in Figure 33. Therefore, 9.724(2)(c) is satisfied. The applicant has satisfied all the applicable approval criteria for a conditional use permit.

A number of opponents' arguments misconstrue the nature of the application. Many of opponents' arguments are based on the theory that the proposed application violates the provisions

and conditions of approval of the 1995 CUP, in particular Condition of Approval 17. Even many of opponents' arguments regarding EC 9.724(2) incorporate references to a required 75-foot buffer. While Condition of Approval 17 from the 1995 CUP included a 75-foot buffer, there is nothing in the approval criteria for a CIR housing CUP that requires a 75-foot buffer. While opponents are correct that the proposed CIR housing would run afoul of the 1995 CUP and Condition of Approval 17, the application is specifically based on the premise (and a condition of approval) that the applicant will also obtain a new CUP regarding the cemetery use that allows Zone 6 to be removed from the cemetery CUP. All of opponents' arguments regarding the 1995 CUP and/or the 75-foot buffer area do not provide a basis to deny the application.

Although this decision approves a conditional use permit for CIR housing, the applicant cannot construct the CIR housing without obtaining further approvals, such as building permits. Since this application was filed in 2002, the City has adopted a number of new ordinances that arguably could apply to future permits for the CIR housing. The applicant explains that some of those provisions cannot be satisfied and would result in the approved CUP being prevented from being constructed. The applicant argues that none of the new provisions should be applicable to future permits necessary to develop the CIR housing under the goal post rule. *See* n 1. The City argues that the goal post rule would not be applicable to future applications to develop the property such as building permits and that the new provisions would apply. The applicant seeks conditions of approval determining that the new provisions do not apply to any future development of the CIR housing. The City seeks conditions of approval determining that the any future development of the CIR housing be subject to the current provisions.

While I understand the applicant's desire to decide the issue (the uncertainty regarding having to comply with provisions that are impossible to comply with could drive away potential developers), I think any decision on this issue would be speculative and advisory. The applicant and the City identify a number of potential EC provisions that they think could apply to any future building permits, but even if such provisions are likely to arise they have not yet arisen and there is no guarantee exactly which provisions may be at issue. The present application is for a conditional use permit to construct controlled income and rent housing, this application is not for building permits. Any speculation about what standards and criteria would apply to future building permits would be just that – speculation.

The parties spend a great deal of time discussing goal post rule cases and their applicability to the present situation. A number of those cases are not particularly relevant to the present situation because they did not involve a two-step approval process like the present case where the first step is approval of a certain type of use and the second step is an application for development such as a building permit to actually construct the use that was approved. Even in those cases involving a two-step process, the issue of what standards and criteria applied arose during the second step – when for instance building permits were submitted – not during the first step. The current application is just the first step, and I do not think it is appropriate or even possible to decide issues that might arise during the second step. For instance, the goal post rule only applies to applications for a permit. "Permit" is defined as "the discretionary approval of a proposed development of land." While it seems likely that any issues regarding what standards and criteria apply during a potential step two process would be discretionary, until such applications are filed and responded to by the City that is not absolutely for certain. Even assuming all such applications would be discretionary and permits for purposes of the goal post rule, there is hardly an exhaustive list of what potential EC provisions might apply, and as the goal post cases demonstrate the nature of those provisions might affect which standards and criteria apply. Even if the City is correct that current standards and criteria would apply, the City acknowledges that under *Gagnier v. City of* Gladstone, 38 Or LUBA 858 (2000), the City "may not apply development standards at the building permit phase, where to do so would result in denial of a project that was previously approved in the processing of a land use application." This further illustrates that the applicability or inapplicability of current standards and criteria will have to be addressed individually if and when they arise.[5] Until any future applications are submitted, any decision about what standards and criteria apply to those applications would be pure speculation.

DECISION

For all the reasons set forth above, the Hearings Official **APPROVES** the conditional use permit to construct 172 units of controlled income rent housing, subject to the following conditions of approval:

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[5] This illustrates the difficulty of even trying to craft conditions of approval at this stage that would be workable at a later stage. A potential condition of approval would have to state which set of standards and criteria apply – except in circumstances where they do not apply. I do not think there is any way to definitively state now what standards and criteria might apply to any future applications. Those standards and criteria will have to be determined on a standard and criterion by standard and criterion basis.

CONDITIONS OF APPROVAL

1. As allowed by EC 9.718, the CIR CUP shall terminate unless an application for a development permit needed to implement the CIR CUP is applied for within 7 years of the effective date of approval. Thereafter, an application for a development permit needed to implement the CIR CUP for each subsequent phase must be applied for not later than 7 years after the completion of construction of the preceding phase. The CIR CUP will terminate with respect to any phase for which an application for a development permit is not applied for within the foregoing time limitations. For purposes of this condition, the "effective date of approval" is the date of all appeals, challenges, and/or suits related to the approval or denial of this CIR CUP and to the cemetery CUP required under these conditions of approval.
2. The property may be developed with up to 172 units of controlled income and rent housing with associated parking and other development described or depicted in the application and materials submitted in support thereof (CIR CUP). Development may occur in one or more phases. Except for the limitation of not more than 172 total units and the development impact area described in these conditions of approval, the site plan is conceptual in nature, is not binding, and the actual development may differ. The timing, size, mix of units, the number, location, and development to be included in each phase and all other matters pertaining to development of the approved CIR CUP are to be determined by the applicant. The applicant is not is not required to develop all of the approved CIR CUP. Property not developed with development approved under this CIR CUP may be developed for other uses provided that the applicant first modifies the footprint of the CIR CUP to remove such property.
3. The CIR CUP property will be developed solely with CIR housing as defined in the 2002 Eugene Code at EC 9.015. If the applicant seeks to develop non-CIR housing on the property, or to change the use in such a manner that it no longer complies with the definition of CIR housing in EC 9.015, the applicant shall obtain any necessary land use approvals and/or permits.
4. Before a development permit to construct any of the 172 units may be issued, a new cemetery CUP shall be obtained so that the area of the property developed with CIR housing lies outside the footprint of the cemetery CUP. The CIR CUP may share facilities

and/or services (including sanitary lines, storm water lines, water lines, electric lines, roads or other means of circulation) with the cemetery and other current or future uses which may be located on or off the property including those lying within the footprint of the new cemetery CUP and/or the CIR CUP.

5. The applicant may capture, pipe, and pump any surface water and/or storm water flowing on the property to a holding reservoir to be used for irrigation so long as the applicant obtains all required City, state, and/or federal permits as may be necessary.
6. Cathedral Way shall at a minimum meet private street construction standards for paving width and depth, sight distance, maximum grade, and sidewalks.[6]
7. Final plans for any phase shall demonstrate that any proposed street meets the local street standard as described in the Eugene Arterial & Collector Street Plan dated November 1999, including but not limited to, maximum grade requirements, sidewalk requirements, sight distance requirements, and traffic controls that might be needed at the proposed intersections.
8. Final plans for any phase for the number of parking spots shall meet the 2002 EC standards.
9. Available but inadequate public services and facilities to the site shall be improved to a level sufficient to support the particular phase of the CIR CUP development. Any such improvements shall be at the applicant's or developer's responsibility and expense.
10. The unimproved portion of West 40th Avenue that extends from the subject property to the intersection of Braeburn Drive shall be improved to the extent necessary to allow access to the CIR development. Options for improvement include a Privately Engineered Public Improvement (PEPI) or Temporary Surfacing Permit (TSP).
11. Concurrently with the proposed street improvements at the intersection of Cathedral Way and Willamette Street, the applicant or developer shall construct a public sidewalk, meeting applicable standards, along the frontage of the property from the intersection of Willamette Street and Cathedral Way running to or directly across from the nearest transit stop on Willamette Street.

[6] The applicant sought language allowing Cathedral Way to be constructed as a private street, public road, service drive, drive aisle, or combination of those options. I agree with staff that the application is for a private street so any approval should be for a private street as well.

12. Except as provided herein, development approved under the CIR CUP shall be located within the shaded area shown on CU-1A dated June 29, 2016 labeled "development impact area." Facilities and services (including sanitary lines, storm water lines, water lines, electric lines, roads, or other means of circulation) may be located outside of the development impact area as determined by the Eugene Public Works Department. Final location of sanitary lines, storm water lines, and water and electric lines shall be as finally determined by the City in PEPI plans and by EWEB's engineering staff. The boundary of the development impact area may be modified by applicant as development occurs provided that such modification results in not more than a net increase of 10% per phase in the footprint of the development impact area to allow for project flexibility and/or to address public works, engineering, developer or funding agency requirements or unforeseen contingencies.
13. For each phase, the applicant shall provide a mapped inventory of existing trees along the boundary of that portion of the proposed development impact area (as depicted on the applicant's site plans dated June 29, 2016) to be developed during the particular phase. The inventory shall indicate the location, size, and species of existing trees within 20 feet of the development impact area boundary. Scaled dimensions shall also be provided on the mapped inventory, and the location of the boundary shall be clearly marked with flagging, stakes, or other obvious visible means of demarcation, in order to determine its actual location on the ground.
14. The entire development impact area may be graded and cleared of vegetation. Vegetation within the "CIR undeveloped area" shall not be removed unless it: i) is dead, diseased, hazardous, noxious or invasive species, or presents a fire threat as further addressed in these conditions of approval, or ii) is necessary to locate facilities or services as directed by Eugene Public Works or the Fire Marshall as addressed in these conditions of approval. If any tree located in the current Zone 6 and within 15 feet of the perimeter of the development impact area should die within 5 years of adjacent construction, that tree will be replaced at a 2:1 ratio with a tree from the City's approved tree planting list in the vicinity of the impacted tree.
15. The applicant shall obtain the services of a certified arborist to provide a report on the proposed impacts to existing trees included in the inventory, including a critical root zone

analysis for the trees along the boundary of impact. The arborist shall include proposed protection measures for trees within the 20-foot area along the boundary of the development impact area. The arborist shall also implement any protection measures needed to ensure the survival of trees on adjacent property where the development impact area abuts the property line along the western boundary of the subject site.

16. The applicant's final site plans for each phase shall be revised to show that the areas outside of the development impact area but presently within Zone 6 (as shown on the final approved plans for the cemetery CUP (CU 95-2)) are designated as "CIR undeveloped area" that are subject to the following additional requirements;
    a. Trees and other native vegetation within the designated "CIR undeveloped area" shall be retained and protected to the extent possible with protective fencing installed at the direction of the certified arborist along the boundary of the impact area, and subject to inspection and approval by City staff, prior to and for the duration of any adjacent construction-related activity.
    b. No excavation, grading, material storage, staging, vehicle parking, or other construction activity shall take place within the identified "CIR undeveloped area" without prior approval by the City.
    c. Removal of dead, diseased, or hazardous tress shall be allowed with documentation from a certified arborist as to the condition of the tree and the need for removal. Documentation must be provided to the City for review and approval prior to tree removal activity. Otherwise, vegetation within the "CIR undeveloped area" shall not be removed unless it is dead, diseased, hazardous, noxious, invasive, or presents a fire threat that is documented by the City's Fire Marshall.
    d. Any tree removed under the provision above shall be replaced at a ratio of 2:1. These replacement trees shall be native species, with a minimum caliper of 2 inches for deciduous trees and a minimum height of 5 feet for coniferous or evergreen trees. Planting, watering, and general maintenance of replacement trees shall be conducted by the property owner in a manner that ensures their establishment and long-term survival.
17. All structures, buildings, parking areas, and trash enclosures shall be setback from exterior property lines in accordance with applicable setback requirements.

18. The applicant's final plans shall show a minimum 6 foot tall site obscuring fence or wall that will be constructed of entirely sight-obscuring materials (i.e. solid, no openings) and/or vegetative screening at the direction of the applicant's landscape architect that will achieve a minimum height of 10 feet within 5 years of planting and be a minimum of 50% sight obscuring along the length of the western boundary where the development impact area abuts the property line as shown on CU-1A dated June 29, 2016. No other screening is required.
19. The required sight-obscuring fence, wall, or vegetative screen shall be installed and inspected for compliance by City staff, prior to occupancy of any dwellings or use of the proposed parking areas along this western boundary. Planting, watering, and general maintenance of the vegetative screen shall be conducted by the property owner in a manner that ensures establishment and long-term survival.

Fred Wilson

Hearings Official

Dated this 31st day of July 2016.

Mailed this _____ day of August 2016.

SEE NOTICE OF HEARINGS OFFICIAL DECISION FOR STATEMENT OF APPEAL RIGHTS

PUBLIC WORKS REFERRAL RESPONSE
CONDITIONAL USE PERMIT - GENERAL CRITERIA

Date: June 13, 2016
To: Gabe Flock, Planning Division
From: Donna Stark, Public Works Engineering
Subject: **CU02-04 Cathedral Park**

Disclaimer: The following referral comments from Public Works staff reflect a preliminary evaluation of compliance with applicable approval standards and criteria. These referral comments include draft findings and recommended conditions of approval, as well as related informational items, relevant to surveying, engineering, transportation, and maintenance issues identified by Public Works staff in the context of the applicable standards and criteria.

These referral comments are intended for review by Planning staff, for incorporation into the City's written decision on the subject application, however, they do not represent a final determination of compliance with the applicable approval standards and criteria. It is acknowledged these referral comments are subject to revision upon further coordination with other affected City departments and utility providers.

Summary: The applicant requests Conditional Use application approval to construct a controlled income and rent housing development. Public Works staff does not find there is sufficient information to recommend approval of the Conditional Use Permit based on the following evaluation of the criteria specific to our area of expertise, per the Eugene Code in effect at the time of application.

EC 9.724(2) Conditional Use Permit Approval Criteria – CIR/CUP

(a) Public facilities and services are available to the site. If the public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to need by reason of:

1. **Prior commitment of public funds or planning by the appropriate agencies, or**
2. **A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or**
3. **Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development.**

An evaluation of individual public services and facilities is provided below.

Water service
Per EWEB referral

Wastewater Service

The applicant proposes connecting a portion of the development to the public wastewater system located within a Public Utility Easement that crosses the southwest portion of the site. Staff notes that the connection to the public wastewater system at this location would appear to involve a crossing of North Braewood Creek. Under current regulations, that stream corridor is protected by the (Goal 5) WR overlay standards and it is not clear whether the proposed connection would even be allowed subject to those rules, if applicable.

Public wastewater service is not currently available in Willamette Street adjacent to the site. The applicant proposes an extension of the public wastewater system from public manhole #321 located in 40th Avenue just east of Willamette Street. Staff also notes that the majority of the dwelling units to be served by this extension are not located within the existing wastewater basin. Public Works staff notes that prior to development, a PEPI permit would be required for the construction of any public wastewater improvements. The applicant may also need to demonstrate capacity in the receiving system as part of the PEPI process.

Streets & Sidewalks

The proposed development is adjacent to Willamette Street to the east and West 40th Avenue to the west. Willamette Street is classified as a minor arterial street, improved with variable width paving and gutters only, within the 80-foot-wide right-of-way prescribed on the Street Right-of-Way Map (figure 61). Sidewalks have not been constructed on this segment of Willamette Street. The street was resurfaced with new asphalt in 2011. West 40th Avenue adjacent to the site appears to be an unimproved dirt surface.

In regards to the existing public streets, in order to make an affirmative finding that streets and sidewalks are available, Public Works staff notes that West 40th Avenue (an existing, unimproved public right-of-way segment that extends from the subject site to the intersection with Braeburn Drive) will need to be improved to allow access to the site. Staff is not aware of any information or details in the application with respect to improvement of this street segment for access to the site. Options for improvement would include a Privately Engineered Public Improvement (PEPI) or Temporary Surfacing Permit (TSP). Prior to or at the time of development, a permit to construct sidewalks on Willamette Street along the full frontage of the subject property would be also be required.

The applicant proposes to construct a private street, "Cathedral Way" through the development, connecting to Willamette Street and to West 40th Avenue. The applicant's written statement indicates the private street is the same configuration as shown on Rest Haven (CU 95-2), and that it will meet local street standards. In response to completeness review comments, the applicant also states that the site plan proposes no changes to current access and ingress to the cemetery, although there is not currently an improved access from Willamette Street. Supplemental site plans with 2008 aerial photo now show the proposed private street in a different configuration than originally proposed, and in a steeper alignment

near its intersection with Willamette Street which would appear to exceed the maximum grade allowed under private street standards.

Based on ITE Category 220/Apartments, the development is expected to generate over 1100 daily trips on average. With an estimated Average Daily Trips greater than 750, the private street would be categorized as a Medium Volume local street. The applicant has not provided sufficient information for Public Works staff to evaluate whether the proposed private street would meet the local street standards as described in the Eugene Arterial & Collector Street Plan dated November, 1999 (also see Section M, Private Streets and Alleys, from adopted Resolution No. 4608). As noted above, the proposed alignment does not appear to meet the maximum grade requirements (15% with up to 200-foot lengths of grades up to 20%, but no intersections or driveway access in areas with grades above 15%). As depicted on the plans, the proposed street also lacks the required sidewalk of at least 3 feet in width along one side and meeting ADA standards. The materials also lack any information about sight distance requirements or traffic controls that might be needed at the proposed intersections. At a minimum, the applicant would need to submit further evidence that the proposed private street can feasibly be constructed to meet the local street standards. Public Works staff also notes that a Traffic Impact Analysis (TIA) is not part of the criteria for this application (under "old code").

Stormwater Service

The site plans show a reference to a 30" pipe near North Braeburn Creek near the southwest corner of the subject property. The creek is also shown on the plans. A PEPI application was submitted in 2007 to pipe the creek at this location, but that application has expired and the proposed work is not approved. In the event that the Hearings Official ultimately approves the CIR-CUP application, Public Works staff recommends that the site plans be revised remove any reference to a 30" pipe in this location.

A private storm drainage system is also shown to provide drainage for the private street and paved surfaces, but the applicant has not demonstrated that the proposed dwelling units will be served by a storm drainage system. Public Works staff does not concur that this criterion has been met and recommends that the plans be revised to demonstrate how the structures are served with storm drainage system that provides an acceptable destination for stormwater runoff. Staff also notes the City's Stormwater Basin Master Plan identifies a capacity deficiency in the public system downstream from the development site that will need to be addressed through the permitting process.

(b) The proposed project is designed to:

3. Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress.

For the reasons described above, with respect to not meeting applicable private street standards, and the general lack of information and evidence to demonstrate the function and safety of circulation, ingress and egress for residents using the proposed street, Public Works staff concludes that this criterion is not met. The proposal also lacks information to demonstrate compliance with applicable parking area standards from EC 9.584 and 9.589.

CONCLUSION

As discussed above, there is insufficient information and evidence in the application materials to date, in order to find compliance with the applicable approval criteria. In the event that the Hearings Official determines there is adequate evidence to find that there is compliance with the criteria, Public Works staff recommends the following be addressed as conditions of approval or subsequent permitting requirements:

- ☐ Prior to development, a PEPI permit shall be issued for the construction of public wastewater improvements. The applicant may need to demonstrate capacity in the receiving system as part of the PEPI process.

- ☐ Prior to development, West 40th Avenue will be improved to allow access to the site. Options for improvement include a Privately Engineered Public Improvement (PEPI) or Temporary Surfacing Permit (TSP).

- ☐ Prior to or at the time of development, a permit to construct sidewalks on Willamette Street along the full frontage of the taxlot shall be issued.

- ☐ The final site plan shall be revised to show the proposed private street shall be constructed to meet the Local Street standards for a Medium-Volume residential street as prescribed in the Eugene Arterial & Collector Street Plan.

- ☐ The final site plan shall be revised to remove the reference to a 30" pipe on the final site plan.

- ☐ The final CUP site plan shall be revised to demonstrate how the structures are served with storm drainage system that provides a destination for stormwater runoff.

- ☐ The final site plan shall be revised to specifically state the dimensions of the parking spaces to confirm consistency with EC 9.584.

- ☐ At the time of development, the stormwater system capacity deficiency identified in the Stormwater Master Plan must be addressed.

INFORMATIONAL ITEMS:

- A PEPI application to pipe North Braewood Creek at the southwest corner of the development site was not issued and has expired.

- The site plan shows piping an on-site creek, and diverting the water to a proposed pond. This proposal is not addressed through the CIR/CUP criteria and is not evaluated or approved through this process. Staff recommends the applicant check if there are any potential water rights issues that would be triggered by this proposal.

- The need for an erosion permit will be evaluated at the time a development permit is submitted.

- Willamette Street was resurfaced in 2011 and is subject to a street cut moratorium.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES WIPER, III
and REST-HAVEN MEMORIAL PARK,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

THOMAS G. EAGAN, DIANA K. EAGAN,
DAVID BERG, JUDITH BERG, LINDA ROE,
TOM ROE, RICHARD STEERS, SHEILA STEERS,
MIKE CURTIS, FRAN CURTIS,
JOHN C. SIHLER, DENE H. SIHLER,
JOHN BENNINGTON and ALLISON HASSLER,
Intervenors-Respondent.

LUBA No. 2004-016

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Dan Terrell and Bill Kloos, Eugene, filed the petition for review. Bill Kloos argued on behalf of petitioners. With them on the brief was the Law Office of Bill Kloos, PC.

Emily N. Jerome, Eugene, filed a response brief on behalf of respondent. With her on the brief was Harrang Long Gary Rudnick, PC.

Douglas M. DuPriest, Eugene, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Hutchinson, Anderson, Cox, Coons, DuPriest, Orr and Sherlock, PC.

BASSHAM, Board Member; HOLSTUN, Board Chair, participated in the decision.

AFFIRMED 05/10/2004

You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision denying petitioners' request to modify an existing conditional use permit.

MOTION TO INTERVENE

Thomas G. Eagan, Diana K. Eagan, David Berg, Judith Berg, Linda Roe, Tom Roe, Richard Steers, Sheila Steers, Mike Curtis, Fran Curtis, John C. Sihler, Dene H. Sihler, John Bennington and Allison Hassler (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO FILE REPLY BRIEF

On April 20, 2004, two days prior to oral argument, petitioners filed an 11-page reply brief, to address alleged "new matters" raised in intervenors' response brief, which was filed April 9, 2004. Intervenors oppose the reply brief, on the grounds that it (1) is not limited to "new matters," (2) exceeds the five page limit authorized by OAR 661-010-0039, and (3) was not filed "as soon as possible" after the response brief was filed, as required by OAR 661-010-0039.[1] Petitioners respond to intervenors' objection, arguing that the reply brief is limited to "new matters," and the inadvertent failure to request permission to file an 11-page reply brief and the timing of filing the brief caused no prejudice and should not warrant denial of the reply brief.

We agree with petitioners that the reply brief is properly limited to "new matters." However, the matters addressed in the reply brief have little bearing on the issues we find to be dispositive in this appeal. Given that, we do not see that resolution of the parties' remaining disputes

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[1] OAR 661-010-0039 provides, in relevant part:

> "A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief together with four copies as soon as possible after respondent's brief is filed. A reply brief shall be confined solely to new matters raised in the respondent's brief. A reply brief shall not exceed five pages, exclusive of appendices, unless permission for a longer reply brief is given by the Board. * * *"

over the reply brief would benefit either Board or bar, and we allow the reply brief without further discussion.

FACTS

The subject property is a 72-acre parcel zoned Low Density Residential (R-1) and partially developed with an existing cemetery. Those portions of the property not already developed as a cemetery are generally wooded. Adjacent properties are generally developed with single family dwellings.

In 1995, petitioners applied for and received a conditional use permit (1995 CUP) approving a masterplan for future development of the subject property. The 1995 CUP approved development in two phases. Phase I proposes cemetery uses on the bulk of the property from the north property line south to the southernmost internal road shown on the masterplan. Phase II involves the southernmost area, consisting of 15.8 acres between the road and the south property line, also known as Zone 6. The 1995 CUP conceptually approved cemetery uses in Zone 6, subject to conditions including a 75-foot buffer along the southern periphery of the CUP site, but did not approve a specific development plan. Instead, the 1995 CUP required future submission and approval of a specific development plan for Zone 6.

In 1998, the city and petitioners entered into a conditional use agreement (1998 CUP agreement), a contract between the parties as to how the 1995 CUP would be implemented. The site plans approved in the 1998 agreement include the notations "Future Cemetery Lawns" and "Proposed Irrigation" in Zone 6, and also depict a vegetative buffer along the southern periphery.

In April 2002, petitioners applied to the city for a conditional use permit to develop a Controlled Income and Rental Housing project (CIR-CUP) in the 15.8-acre Zone 6 area. The city refused to process the application, because the city perceived conflicts between the 1995 CUP and the CIR-CUP application that the city believed prevented approval of the CIR-CUP application. The city's refusal to process the CIR-CUP application was appealed to this Board, which remanded the decision to the city to process the application and render a decision. *Wiper v. City*

of Eugene, 44 Or LUBA 127 (2003). On remand, the city requested that petitioners first modify the 1995 CUP, to remove the 15.8-acre Zone 6 area from the footprint of the CUP masterplan, before proceeding with the CIR-CUP application. The petitioners requested that the city suspend consideration of the CIR-CUP application, and subsequently filed the instant application to modify the 1995 CUP to excise the Zone 6 area from the footprint of the CUP masterplan.

Staff accepted the modification application as complete, but recommended that the scope of the application be expanded to include modifications necessary to allow new uses in Zone 6 to access roads and utilities in other parts of the property that would remain subject to the 1995 CUP. Petitioners revised the application in accordance with the staff recommendation. The city planning director approved the modification application on October 31, 2003.

Intervenors, among others, appealed the planning director's decision to the city hearings officer, who held a public hearing on December 17, 2003. Two days prior to the public hearing, on December 15, 2003, petitioners requested in writing that the hearings officer include in her decision a determination as to whether Zone 6 could be developed with uses otherwise allowed in the R-1 zone, such as residential uses, without modifying the 1995 CUP. On January 16, 2004, the hearings officer issued a decision that (1) determined that modification of the 1995 CUP is necessary, but (2) denied the requested modification to excise Zone 6 from the CUP masterplan footprint and the related request to allow uses in Zone 6 to access roads and utilities in other CUP areas under the masterplan.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners contend that the hearings officer failed to adequately address or resolve petitioners' request for a determination as to whether Zone 6 could be developed with uses allowed in the R-1 zone without a modification of the 1995 CUP. To the extent the hearings officer adequately resolved that issue, petitioners argue, the hearings officer incorrectly concluded that modification of the 1995 CUP was necessary.

Petitioners took the position before the hearings officer that because the 1995 CUP did not approve any particular development in Zone 6, no modification of the 1995 CUP to excise Zone 6 from the masterplan was necessary in order to develop Zone 6 with uses otherwise allowed under the R-1 zone. The hearings officer considered that argument and, after quoting and reviewing portions of the 1995 CUP, concluded as follows:

> "[N]otwithstanding the applicant's present position, the 1995 CUP clearly included the Zone 6 area as part of the CUP, and the [1995] Hearings Official relied upon the applicant's proposed use of that property, *i.e.*, the buffer proposed for that zone, in his description of the site and his evaluation of the use as applied to the approval criteria. The applicant also relied on that zone as part of the CUP in order to comply with Condition 17, which required a 75-foot buffer zone on the site's southern periphery. To argue now that the Zone 6 portion of the use was not a part of the 1995 CUP approval is inconsistent with the applicant's previous representations and proposals regarding the use of that site, the 1995 CUP approval and the applicant's final approved master plan. * * *
>
> "Further, the fact that additional review was required prior to further development beyond the conceptual plan provided for Zone 6 in the 1995 application does not exempt that portion of the site from the CUP. Rather, as the Hearings Official explained, the applicant had conceptually proposed tombs and fencing in addition to a proposed vegetative buffer [in Zone 6]. The Hearings Official found that, since further development of this portion of the site—beyond its approved use as a buffer—was proposed for a future phase, conceptual approval at that time was adequate, provided that additional review was completed prior to development 'in that regard.' This does not exempt [Zone 6] from the CUP, or allow the applicant to remove that portion of the property without a modification to the CUP.
>
> "Condition 16 of the 1995 CUP decision states that 'if the timing, location or size of any of the proposed improvements included in the master development plan are changed, a minor modification to this CUP shall be required. If there are substantial changes to the timing, location or size of these improvements, a major modification of this CUP may be required.' The request to remove Zone 6 from the CUP changes the location and size of improvements included in the master development plan within the meaning of Condition 16.
>
> "* * * [In addition], all modifications to approved CUPs must be evaluated for compliance with the criteria at EC [Eugene Code] 9.8110. As the Planning Director's decision correctly determined, 'as clearly established on the approved site plans, and within the CUP performance agreement, the subject area was conceptually approved for cemetery use with several requirements such as a 75-foot wide buffer zone along its periphery. As such, the applicant's request to

> remove the subject area from the cemetery master plan is correctly submitted as an application for CUP modification.'
>
> "The applicant's request for a determination that no modification is required to remove the Zone 6 property from the Rest Haven CUP is denied." Record 8-9 (quoting from portions of the planning director's decision at Record 308-09).

Petitioners argue first that the hearings officer mischaracterized the issue as whether (1) Zone 6 *is* part of the 1995 CUP or (2) a proposal to *remove Zone 6* from the 1995 CUP required a modification of the 1995 CUP. According to petitioners, the actual issue petitioners presented was whether a proposal to *develop Zone 6* with uses otherwise allowed in the R-1 zone required modification of the 1995 CUP to remove Zone 6. Petitioners contend that the hearings officer never resolved the actual question presented.

Although portions of the hearings officer's decision appear to mischaracterize the issue in the manner petitioners contend, we believe that the hearings officer understood the question presented and that the adopted findings adequately resolve that issue. Fairly read in the context of other findings in the decision, the hearings officer essentially concluded that the 1995 CUP approved conceptual uses and imposed conditions such that modification of the 1995 CUP is necessary in order to approve development that is different from that conceptually approved (*i.e.*, cemetery uses) or that affects compliance with conditions imposed on development of Zone 6, such as the requirement for a 75-buffer along the southern periphery. The hearings officer's conclusion to that effect is adequate for review.

Turning to petitioners' challenge to that conclusion, petitioners argue that the hearings officer's misconstrued the 1995 CUP. According to petitioners, the 1995 CUP simply required that *if* petitioners want to develop Zone 6 with cemetery uses, petitioners must submit a more detailed development plan for approval and that plan must require a 75-foot buffer between cemetery uses and the residences adjoining the southern property line. Petitioners contend that nothing in the 1995 CUP prohibits a non-cemetery use in Zone 6. Further, petitioners argue that the sole purpose of the condition requiring the 75-foot buffer is to separate cemetery uses in Zone 6

from the residential uses adjoining the southern property boundary. That buffer becomes unnecessary if Zone 6 is developed with non-cemetery uses, petitioners argue, and to the extent some kind of buffer is still desirable to protect residences adjoining the southern property line the entirety of Zone 6 will act as a buffer between cemetery uses elsewhere on the property and those residential uses.

We disagree with petitioners that the hearings officer misconstrued the 1995 CUP. The 1995 CUP applicant proposed, and the city conceptually approved, cemetery uses in Zone 6. The conditions and uses approved under the 1995 CUP were predicated on an assumption that Zone 6 would be developed with cemetery uses. For whatever reason, the 1995 hearings official was clearly concerned with buffering residential uses and cemetery uses, and petitioners offer no reason to believe the hearings official's concern was limited to the specific residences adjoining the southern property boundary. Had the city known in 1995 that petitioners would change their mind and propose non-cemetery development in Zone 6, such as the residential development proposed in the pending CIR-CUP application, the city might well have imposed different or additional conditions to buffer those uses from cemetery uses elsewhere on the subject property, in deciding to approve or deny the 1995 CUP. In short, the hearings officer correctly concluded that development of Zone 6 with uses other than those uses contemplated by the 1995 CUP requires modification of or amendment to the 1995 CUP.

The first assignment of error is denied.

SECOND AND THIRD ASSIGNMENTS OF ERROR

As discussed, the particular modification petitioners proposed was to remove Zone 6 from the footprint of the 1995 CUP. Modifications to an existing CUP are governed by the standards at EC 9.8110, which require a finding that the proposed modification is not "materially inconsistent with the conditions of the original approval," and that it will "result in insignificant changes" in

physical development, use of the site, and impacts on surrounding properties.[2] The hearings officer concluded that the proposed removal of Zone 6 from the 1995 CUP satisfied neither criterion. In addition, the hearings officer concluded that the additional modification suggested by city staff—to allow development in Zone 6 to use roads and utilities within the remaining CUP area—was inconsistent with EC 9.8110(2).

A. EC 9.8110(1)

Petitioners first challenge the hearings officer's conclusion that removal of Zone 6 from the 1995 CUP footprint is "materially inconsistent with the conditions of the original approval." The hearings officer determined that the proposed modification was inconsistent with Condition 17, which the hearings officer understood to require a 75-foot vegetative buffer along the southern periphery of the CUP site.[3]

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[2] EC 9.8110 provides:

> "After the effective date of the approval of the conditional use permit, modifications to the approved conditional use permit may be considered in accordance with the Type II application procedures contained in EC 9.7200 through 9.7230, Type II Application Procedures. The planning director shall approve the request only if it complies with the following criteria:
>
> "(1) The proposed modification is not materially inconsistent with the conditions of the original approval; and
>
> "(2) The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties.
>
> "If the requested modification does not meet the criteria for approval, the application will be denied. The applicant may submit the requested modification as a new conditional use permit application based on Type III procedural requirements. Nothing in this land use code shall preclude the applicant from initially submitting the requested modification as a new conditional use permit application."

[3] The hearings officer's decision state, in relevant part:

> "[T]he question that must be addressed here is what impact the removal of this property from the CUP will have on compliance with Condition 17. That condition requires that the buffer along the southern periphery of the CUP be at least 75 feet wide. The applicant proposed that buffer, using the property it now proposes to remove from the CUP, in order to ensure compatibility, as required by former EC 9.702(a). Removal of that property will remove the existing 75-foot buffer. Removal of that buffer, however, does not remove the condition, which was found necessary, in Conditions 7 and 17, to establish compatibility and thus compliance

Petitioners repeat their argument that the only purpose of the 75-foot buffer requirement is to ensure compatibility between cemetery uses in Zone 6 and *existing* residential uses adjoining the southern property line. The proposed modification is consistent with that purpose, petitioners argue, because all of Zone 6 would buffer residential uses along the southern property line from cemetery uses elsewhere on the subject property. Petitioners also dispute the hearings officer's conclusion that the required buffer must be "vegetative." Finally, petitioners argue that the hearings officer erred in finding that petitioners had already removed most of the vegetation along what would become the southern periphery of the CUP site, if the proposed modification were approved. According to petitioners, although petitioners did obtain tree cutting permits for that area, the permits expired, and no tree-cutting in that area has in fact occurred. *See Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231, *aff'd* 189 Or App 90, 74 P3d 1107 (2003) (dismissing petitioners' appeal of tree-cutting permits as moot).

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with EC 9.702(a). In order to be compatible, Condition 17 requires that the buffer along the southern periphery must be at least 75 feet wide. The applicant has not established how it will continue to comply with that condition after the Zone 6 property is removed from the CUP. In fact, in reliance on the approved Master Plan, the applicant has removed most of the vegetative buffer along what it now proposes to be the southern periphery of the CUP site.

"The applicant argues that there is no requirement that the 75-foot buffer between the cemetery and adjacent properties be vegetative. However, [Condition 7 of the 1995 CUP] approval, quoted above, clearly establishes that the compatibility was dependent upon a vegetative buffer. Moreover, regardless of whether it is vegetative, in this modification application, applicant has not established how it proposes to provide a 75 foot buffer of any kind along the CUP's southern periphery. The applicant argues that the land it proposes to remove from the CUP will be a buffer between the cemetery and the existing adjacent residential neighborhood. However, if the Zone 6 property is removed from the CUP, it cannot be relied upon as the buffer required by the CUP. Condition 17 requires that the buffer along the cemetery's southern boundary be 75 feet. That condition cannot be satisfied by a 'buffer' outside the property subject to the CUP.

"* * * * *

"The applicant has not established how removal of the Zone 6 property can be achieved while continuing to comply with Condition 17 of the 1995 CUP approval. Removal of that property without compensating with a comparable buffer along the CUP's southern periphery results in a CUP that is materially inconsistent with Condition 17 of the original approval." Record 11-12.

1. Vegetative Buffer

With respect to whether the required buffer must be vegetative, we agree with intervenors and the hearings officer that the site plan and other conditions imposed in the 1995 CUP and the 1998 CUP agreement make it reasonably clear that the buffer was intended to be vegetative in character.

2. Consistency with Condition 17

With respect to whether removal of Zone 6 from the CUP footprint, and hence elimination of the requirement for a vegetative buffer in Zone 6, would be consistent with condition 17, the hearings officer's decision implicitly rejects petitioners' argument that the sole purpose of condition 17 is to buffer *existing* residential uses south of the property line. Instead, the hearings officer appears to view condition 17 more broadly as intended to ensure compatibility between cemetery uses within the CUP footprint and adjoining non-cemetery uses outside the CUP footprint. According to the hearings officer, condition 17 does so by requiring a buffer along the southern periphery of the CUP area, which as proposed and approved in 1995 was in Zone 6. Therefore, the hearings officer concluded, consistency with condition 17 requires a similar buffer within the southern periphery of the CUP area, once Zone 6 is removed from the CUP footprint. Because petitioners did not propose *any* buffer within the southern periphery of the CUP area after Zone 6 is removed, the hearings officer rejected the proposed modification as inconsistent with condition 17 and therefore not compliant with EC 9.8110(1).

The hearings officer's understanding of the purpose of condition 17, and hence what consistency with condition 17 means for purposes of EC 9.8110(1), is plausible and supported by the record. Petitioners' different view of the purpose of condition 17 is also plausible and has support in the record. However, petitioners' disagreement with the hearings officer on this point does not establish that the hearings officer misconstrued condition 17 or committed reversible error in concluding that the proposed modification was inconsistent with condition 17.

B. EC 9.8110(2)

The hearings officer also concluded that the proposed modification failed to comply with EC 9.8110(2), which requires in relevant part a finding that the modification will have insignificant impacts on the surrounding properties. *See* n 2. The hearings officer relied on testimony from adjoining landowners that the preservation of the existing vegetative buffer in Zone 6 was necessary to prevent adverse impacts to their properties, specifically to prevent "windthrow" of downed trees and increased runoff onto their properties.[4]

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[4] The hearings officer's decision states, in relevant part:

> "* * * [W]hile the modification will not change the use of the remaining property as a cemetery, the use of the Zone 6 portion of the cemetery as a buffer necessary to ensure compatibility for purposes of drainage and windthrow, and the impact to the surrounding properties when that buffer is removed from the CUP protections, must be evaluated. While the applicant states that the removal of the Zone 6 area from the CUP in itself will not alter the appearance of that property, it will remove the condition that the Zone 6 area remain as a buffer. As one concerned neighbor with a Forestry degree explained:
>
> > "'Anyone who has ever viewed a clear cut in a west-side Cascade Douglas Fir forest knows that for the first few years after the clear cut Douglas Fir trees will blow down around the edge * * * Doug fir trees are very shallow rooted and prone to blow down when suddenly exposed to wind by the removal of trees around them.
> >
> > "'Most of the properties surrounding Rest Haven have large Doug fir trees in the back yards. I have two; one about 20 inches in diameter and one about 24 inches in diameter. Both are uphill from my house, close to the property line. If these trees blew down, they would land downhill and are tall enough to hit my house. Cutting trees in the buffer would directly impact my property. If trees were cut in the buffer next to my property, I would have the choice between taking a chance of these trees blowing down and doing serious damage to my house or removing the trees. The buffer contemplated by the original conditional use permit protects my property from harm.'
>
> "Other nearby residents testified regarding the increased run-off that could occur without the protection of the buffer provided by the 1995 CUP and the impacts of that run-off on their properties.
>
> "The applicant is correct that removal of the Zone 6 property from the CUP does not guarantee that the trees will be removed. However, removal of that property from the CUP will remove the protections afforded by that CUP, and the removal of those protections could have a significant adverse impact on the surrounding properties. Accordingly, before a conclusion can be made that the modification will have no impact on the surrounding properties or the use of the site, the effect of the removal of the protections of the CUP Master Plan condition requiring a 75-foot buffer must be considered. The applicant has not sustained its burden to establish that there will be an insignificant change in the use or surrounding area as a result of this proposed modification." Record 13 (ellipses in the internal quote in original).

Petitioners argued to the city that any development within Zone 6 that might involve removal of trees within the 75-foot vegetative buffer would be subject to city regulations governing tree-cutting, and therefore will be consistent with city code. Record 216, 349.[5] According to petitioners, the city's tree-cutting and stormwater regulations require evaluation of any adverse impacts on adjoining properties, including windthrow and drainage impacts. Petitioners contend that the existence and potential applicability of such regulations is highly relevant to whether the proposed modification, which effectively voids the 1995 CUP conditions requiring a vegetative buffer in Zone 6, will impact adjoining properties. Citing *Norvell v. Portland Area LGBC*, 43 Or App 849, 852-53, 604 P2d 896 (1979) for the proposition that the decision maker must address focused evidence and concerns raised below regarding compliance with applicable standards, petitioners contend that the hearings officer failed to consider petitioners' arguments on this point, and remand is necessary to adopt findings addressing the issue of whether the city's tree cutting and stormwater regulations suffice to ensure that the proposed modification will not result in significant impacts to surrounding properties, for purposes of EC 9.8110(2).

Intervenors respond that mere citation to the city's tree cutting ordinances is insufficient to obligate the hearings officer to address whether those ordinances (1) provide equivalent protection

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[5] Petitioners cite to the following portions of the application and written argument to the hearings officer, respectively:

> "* * * [A]ny tree removal that will take place on the excised Zone 6 area will continue to be subject to the tree removal provisions of the Eugene Code (EC) either under EC Chapter 6, if tree removal is done without a related land use approval, or under EC Chapter 9, if tree removal is done as part of an associated land use approval. Consequently, any tree removal done in the excised Zone 6 following approval of this modification application will be done subject to the criteria in the Eugene Code, which is what [1995 CUP condition of approval no. 8] requires. Therefore the proposed modification is not materially inconsistent with the conditions of the original approval." Record 349.

> "[Opponents'] fourth objection * * * is directed towards the 'buffer' that they argue will be removed by the decision. The buffer between the cemetery and existing residential uses will remain as a result of this decision. Cemetery uses will not extend south of the proposed roads. Likewise, the on site vegetation will remain. This decision does not authorize any tree removal from the subject property. Any future tree removal will have to be consistent with the provisions of the Eugene Code. That is what was required by the CUP, and that is what continues to be required by the current code." Record 216.

as the 1995 CUP, or (2) provide a basis to conclude under EC 9.8110(2) that the proposed modification will result in insignificant impacts on adjoining properties. Intervenors contend that petitioners bear the burden of demonstrating compliance with EC 9.8110(2), and that petitioners failed to submit any evidence or even focused argument that the city's tree cutting ordinances provide the same protections as the 75-foot vegetative buffer required by the 1995 CUP.

We agree with intervenors that petitioners did not adequately raise the issue that they fault the hearings officer for failing to address. The testimony petitioners cite to is not directed at EC 9.8110(2) and at best presents an argument that the city's tree cutting ordinance will ensure that any tree removal that occurs will be consistent with the city's tree cutting ordinance. *See* n 5. That argument falls far short of alerting the hearings officer that petitioners believe the city's tree cutting ordinance requires evaluation of impacts to adjoining properties, and further offers protection equivalent to the vegetative buffer imposed by the 1995 CUP, for purposes of complying with EC 9.8110(2). Petitioners do not argue they raised any issue below regarding whether the city's stormwater regulations are sufficient to protect adjoining properties against increased runoff that might result from loss of the vegetative buffer, for purposes of EC 9.8110(2). Having failed to raise these issues below, petitioners' argument that the hearings officer erred in failing to address them does not provide a basis for reversal or remand.

C. Modifications to Access and Utilities

Having rejected the proposed modification to remove Zone 6 from the 1995 CUP footprint, the hearings officer proceeded also to reject the proposed modification to the 1995 CUP to allow future development in Zone 6 to access and use roads and utilities within the remaining CUP area.[6]

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[6] The hearings officer's decision states, in relevant part:

> "Likewise, the applicant has proposed changes to access and utility installation, yet has not provided any evaluation as to how the change in access or installation could impact the surrounding properties or the use of the site. While any change may be insignificant, without that evaluation, and a statement of the purpose of the changes, that evaluation cannot be made." Record 14.

Although not entirely clear, the hearings officer appeared to conclude that petitioners failed to present enough information or analysis to conclude that the proposed modification complied with EC 9.8110(2).

Petitioners contend that the findings quoted at n 6 are unacceptably conclusory, in that the findings fail to explain what evidence or evaluation is missing. Alternatively, petitioners contend that, pursuant to ORS 197.522, even if the proposed modification is inconsistent with EC 9.8110(2), the city was obligated to approve petitioners' application under reasonable conditions that make the proposed modification consistent with applicable regulations.[7]

Intervenors cite to testimony that use of roads and utilities within the CUP area by non-cemetery development in Zone 6, such as residential uses proposed in the pending CIR-CUP application, could have significantly greater adverse impacts on surrounding properties than the cemetery uses conceptually approved in Zone 6 under the 1995 CUP. According to intervenors, petitioners failed to recognize or address those impacts, and instead took the position that any impacts from use of roads and utilities by future development in Zone 6 are speculative and beyond the scope of consideration under EC 9.8110(2). Intervenors argue that the hearings officer disagreed with that position, and rejected the proposed modification because petitioners failed to present any evidence or evaluation of the impacts of the proposed modification on surrounding properties or the CUP site. With respect to ORS 197.522, intervenors argue that the city is under no obligation to present evidence on petitioners' behalf or provide the evaluation necessary to determine compliance with EC 9.8110(2). Further, intervenors contend that petitioners did not

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[7] ORS 197.522 provides:

> "A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval."

suggest any conditions below that would allow approval of the proposed modification under EC 9.8110(2).

While brief, the hearings officer's findings adequately explain the basis for denial. The hearings officer apparently believed that the proposed modification—to allow unspecified future development in Zone 6 to use roads and utilities within the remaining CUP site—could impact surrounding uses or the use of the site, and faulted petitioners for failing to present *any* evaluation or evidence regarding potential impacts. Petitioners took the position below that the proposed modification itself causes no impacts, and any impacts related to use of roads and utilities by future development in Zone 6 are too speculative to evaluate. The hearings officer clearly disagreed with that position, and viewed EC 9.8110(2) as requiring at least some evidence and evaluation regarding the potential impacts of allowing future development in Zone 6 to use roads and utilities in the CUP area. Petitioners have not demonstrated that the hearings officer erred in so viewing EC 9.8110(2) or in rejecting the proposed modification for failure to provide the required evidence and evaluation.

With respect to ORS 197.522, even assuming that statute is applicable in the present instance, as we explained in *Oien v. City of Beaverton*, ___ Or LUBA ___ (LUBA Nos. 2002-075/076, December 30, 2003, slip op 16-17), the applicant, and not the local government, has the obligation under that statute to identify and propose "reasonable conditions" that might allow approval. Here, petitioners did not identify or propose any conditions that would allow the city to find that the proposed modification complies with EC 9.8110(2). The hearings officer was under no obligation to attempt to craft such conditions on her own.

The second and third assignments of error are denied.

The city's decision is affirmed.

Eugene Planning

APPEAL OF INITIAL HEARINGS OFFICIAL OR ~~HISTORIC~~ REVIEW BOARD DECISION

The appeal of an initial Hearings Official or Historic Review Board decision provides for a review of a quasi-judicial decision by a higher review authority specified in the Land Use Code. In general, the appeal procedures allow for a review of the original application, the Hearings Official or Historic Review Board decision, the appeal application, and any facts or testimony relating to issues and materials that were submitted before or during the initial quasi-judicial public hearing process. The Hearings Official or Historic Review Board decision may be affirmed, reversed, modified, or remanded by the Planning Commission.

Please check one of the following:

- ☐ Adjustment Review, Major
- ☑ Conditional Use Permit
- ☐ Historic Landmark Designation
- ☐ Planned Unit Development, Tentative Plan
- ☐ Willamette Greenway Permit
- ☐ Zone Change*

**This appeal form is not applicable for zone changes processed concurrently with a Metro Plan amendment, the adoption or amendment of a refinement plan, a Land Use Code amendment, or the application of the /ND Nodal Development overlay zone.*

City File Name: CATHEDRAL PARK

City File Number: CU 02-4

Date of Hearings Official or Historic Review Board Decision: AUGUST 1, 2016

Date Appeal Filed: AUGUST 11, 2016

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☑ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how the Hearings Official or Historic Review Board failed to properly evaluate the application or make a decision consistent iwtht he original application. Please contact Planning staff at the Permit and Information center, 99 West 10th avenue, 541-682-5377, for further information on the appeal process.

☑ A filing fee must accompany all Hearing's Official and Historic Review Board appeals. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning staff at the Permit and Information Center to determine the required fee or check on the web at: www.eugeneplanning.org

Planning & Development
Planning Division
99 W. 10TH Avenue, Eugene, OR 97401
P 541.682.5377 * F 541.685.5572

Acknowledgment
I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT:

Name (print): MARILYN COHEN Phone: 541-344-0796

Company/Organization: ——

Address: 71 WESTBROOK WAY

City/State/Zip: EUGENE, OR 97405

Signature: Marilyn Cohen

PLEASE SEE ATTACHED LIST OF CO-APPELLANTS

APPELLANT'S REPRESENTATIVE:

Name (print): ——

Company/Organization:

Address:

City/State/Zip: E-mail (if applicable):

Phone: Fax:

Signature:

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association:

CATHEDRAL PARK, CU 02-4

LIST OF CO-APPELLANTS

David and Judy Berg;
4125 Brae Burn Drive, Eugene, OR 97405
Notified and testified (directly adjacent neighbors to proposed Cathedral Park)
Glenn and Margery Campbell
4103 Brae Burn Drive, Eugene, OR 97405
Notified and testified (directly adjacent neighbors to proposed Cathedral Park)
Marilyn Cohen
71 Westbrook Way, Eugene, OR 97405
Testified (Adversely affected neighbor)
Dan and Kate Dubach
77 Brae Burn Drive, Eugene, OR 97405
Notified and testified (directly adjacent neighbors to proposed Cathedral Park)
Eldon and Sarah Fox
4015 Brae Burn Drive, Eugene, OR 97405
Notified and testified (directly adjacent neighbors to proposed Cathedral Park)
Patricia Harding
3999 Brae Burn Drive, Eugene, OR 97405
Notified and testified (impacted by additional traffic on W. 40th Ave.)
Tamara Horodysky;
27 Westbrook Way, Eugene, OR 97405
Testified (Adversely affected neighbor)
Alison McNair and Jamie King
39 Westbrook Way, Eugene, OR 97405
Notice and testified (adversely affected neighbor)
Leslie Parker;
515 West 40th Avenue, Eugene, OR 97405
Testified (impacted by additional traffic on 40th Ave)
Richard and Sheila Steers
4059 Brae Burn Drive, Eugene, OR 97405
Notified and testified (directly adjacent neighbors to proposed Cathedral Park)
Ingrid Wendt
35 Westbrook Way, Eugene, OR 97405
Testified (advesely affected neighbor)

Planning
Receipt

Planning & Development
Planning Division
99 West 10th Avenue
Eugene, OR 97401
(541) 682-5377

Date: 9/11/16

Received From: MARILYN COHEN

Address:

Method of Payment:
- ☐ Cash
- ☒ Check
- ☐ Visa/MC

Amount Received: $ 1190.00

Phone: ( )

Project: CU 02-4

Enter amount:

Annexation	$	Subdivision, Tentative	$
Appeal	$ 1190.00	Subdivision, Final	$
Conditional Use Permit	$	Traffic Impact Analysis	$
Legal Lot Verification	$	Vacations (all)	$
Lot Validation	$	Willamette Greenway Permit	$
Partition, Tentative	$	Zone Change	$
Partition, Final	$	Other	$
Property Line Adjustment	$	Fire Review Fee	$
PUD Tentative	$	**Subtotal**	$
PUD Final	$	***Administrative Fee (except appeals)***	$
Site Review	$	**TOTAL**	$ 1190.00

Staff Initials: KEW

Updated: June 2015

DUPLICATE RECEIPT DUPLICATE RECEIPT

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CITY OF EUGENE
BUILDING & PERMIT SERVICE
99 WEST 10TH AVE 682-5086
REG-RECEIPT:3-0005745 Aug 11 2016
CASHIER: DMB

==========

Appeal of Planning App De	$1,190.00
TOTAL DUE:	$1,190.00

RECEIVED FROM:
MARILYN COHEN

Check:	$1,190.00
Total tendered:	$1,190.00
Change due:	$.00

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www.eugene-or.gov/bldgpermittracking

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Please take our customer survey at:
www.surveymonkey.com/s/COEPermitSurvey

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DUPLICATE RECEIPT DUPLICATE RECEIPT

Eugene City Attorney's Office

Memorandum

Date: **June 29, 2016**

To: **Fred Wilson, Hearings Official**

From: **Anne C. Davies**

Subject: **Cathedral Park (CU 02-4)**

Approval or denial of a zone change or "permit" application is based on the standards and criteria that were applicable at the time the application was first submitted. ORS 227.178(3) (aka "the goal post rule"). While this rule seems very straightforward, its implementation is anything but.

In this case, the applicant applied for a conditional use permit (CUP) for a controlled income and rent (CIR) housing development in 2002. The city initially rejected the application, but that decision was overturned by LUBA. On remand, the applicant chose not to initiate the remand proceedings until very recently, May of this year. The city and the applicant appear to agree that the 2002 CIR CUP approval criteria found in EC 9.724(2002) are the applicable approval criteria for this application. The Hearings Official's decision on the proposed application should be based exclusively only those 2002 CIR CUP approval criteria.

That said, the city has conducted further legal research regarding the scope of the goal post rule in order to inform the applicant, interested parties and the hearings official how the development of the proposed multi-family housing will likely proceed if the CIR CUP application is approved. The goal post rule and applicable caselaw do not preclude the city from applying, for a subsequent building permit, applicable development standards that are not CUP approval criteria. The goal post rule freezes the approval criteria that are applicable to the application at issue; it does not preclude the city from applying, during the building permit phase, all other subsequently adopted standards or regulations that are not part of the approval criteria applicable to the subject zone change or permit application. As a general matter, the goal post rule does not apply to construction and development standards where the land use approval does not address the facts relevant to those standards. *See Rivera v. City of Bandon*, 38 Or LUBA 736 (2000). Further, the goal post rule applies to the application *as filed*. *DLCD v. Jefferson County*, 220 Or App 518, 188 P3d 313 (2008).

The applicable approval criteria for this application are found in EC 9.724(2002):

> EC 9.724(2) Criteria for hearings official approval. Applications for conditional use permits for controlled income and rent housing shall be processed and scheduled for public hearings in the same manner as other conditional use permit

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applications, except the following shall substitute for the required criteria listed in section 9.702:

(a) Public facilities and services are available to the site. If the public services and facilities are not currently available, an affirmative finding may be made if the evidence indicates that they will be available prior to need by reason of:

1. Prior commitment of public funds or planning by the appropriate agencies, or

2. A commitment by the applicant to provide private services and facilities acceptable to the appropriate public agencies, or

3. Commitment by the applicant to provide for offsetting all added public costs or early commitment of public funds made necessary by the development.

(b) The proposed project is designed to:

1. Avoid unnecessary removal of attractive natural vegetation;

2. Provide setbacks or screening as necessary when possible and practical to ensure privacy to adjacent outdoor living areas; and

3. Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress.

(c) The increase in density shall not be permitted in areas that are unavailable for controlled income and rent (CIR) housing with increased density. Areas that are unavailable for increased density are shown on Figure 33 as shaded areas. Those areas not shaded on Figure 33 are available for CIR housing with increased density.

These are the sole criteria that are applicable to approval or denial of this CUP application. *See* EC 9.386(13)(2002) ("[w]here an application is processed under section 9.724, the provisions of that section are exclusive"). That said, there are development standards that will be triggered at the time of building permit and/or PEPI (Privately Engineered Public Improvement) issuance that are not frozen by the goal post statute.

It is highly unusual, although not unheard of, for an application to sit fallow for over ten years on remand from LUBA. In this particular case, many code provisions (including the CIR approval criteria) and applicable development standards have changed dramatically since 2002. It is the City's position that, unless the site plan for the proposed CIR CUP application specifically

addresses development standards that were in effect in 2002, then development standards that are not part of the applicable CUP approval criteria are not locked in by the goal post rule. *See Gilson v. City of Portland*, 22 Or LUBA 343 (1991) (where height limit is a standard that is incorporated into the applicable land use approval criteria, applicant must comply with height limit in effect at the time the land use application was first submitted); *compare Tuality Lands Coalition v. Washington County,* 22 Or LUBA 319 (1991) (where land use approval does not result in overall master plan approval that governs all future aspects of the development, the goal post rule does not lock in development standards that are not applicable substantive approval criteria). In most instances, the current development standards will apply. For example, the 2002 application and site plan address the 2002 parking requirements in EC 9.586(11)(e)(2002) (1¼ parking spaces per unit). Accordingly, the 2002 parking requirements, not the current parking requirements will apply. For the most part, the 2002 proposal was intentionally flexible and conceptual in nature and did not address specific development standards. Accordingly, few of the 2002 development standards were locked in place. The following is a brief summary of the applicability of some of the relevant standards identified by staff.

1. This CIR CUP application proposes multi-family development. EC 9.5500 provides multi-family standards that apply to qualifying multi-family development. The standards are not part of, nor are they incorporated into, the CUP approval criteria. Rather, they apply directly by virtue of the applicability section in the multi-family standards themselves: "multiple-family standards shall apply to all multiple family developments in all zones." EC 9.5500(2). The goal post rule does nothing to nullify the applicability of these standards to the proposed multi-family development. Accordingly, the multi-family standards will eventually apply to this development.

That said, the city may not apply development standards at the building permit phase, where to do so would result in denial of a project that was previously approved in the processing of a land use application. *Gagnier v. City of Gladstone*, 38 Or LUBA 858 (2000). Therefore, where strict compliance with one or more of the multi-family standards from EC 9.5500 would require denial of the proposal, some of the multi-family standards may not apply.

2. EC 9.6790 through EC 9.6797 provides stormwater management regulations for development within the city. The 2002 CIR CUP criteria do not address stormwater issues at all. The current stormwater regulations include two sets of standards—one set that applies to certain land use applications and another set of standards that apply to development permits submitted after March 1, 2014. No development permit has yet been submitted or issued for the Cathedral Park proposal. But when one is, the stormwater standards will apply.

3. The subject property has a /WR (Water Resources Conservation) overlay zone. This is a Goal 5 protection that was placed on the property after the CIR CUP application was filed in 2002. The 2002 CIR CUP criteria did not address protections of the Goal 5 resources, and accordingly, these standards will apply. EC 9.4910.

4. Finally, the current Eugene Code requires an applicant to prepare a traffic impact analysis (TIA) when one of four conditions are met. EC 9.8670. The applicable CIR CUP criteria from 2002 require the applicant to demonstrate the proposed project is designed to: "Provide safe and usable parking, circulation, and outdoor living areas as well as ingress and egress." The fact that this criterion is frozen by the goal post rule does not preclude application of the TIA requirements to this proposal. To the extent any of the four triggers set out in EC 9.8670 apply, the applicant will need to provide a TIA.

ACD:abm